TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 217

WILLIAM STEVENS, PETITIONER,

vs.

THE VESSEL "WHITE CITY," HER ENGINES, TACKLE, APPAREL, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 10, 1931

CERTIORARI GRANTED OCTOBER 19, 1931

(36,031)

(36,031)

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

WILLIAM STEVENS, Libellant,

against

The vessel "WHITE CITY," HER ENGINES, TACKLE, APPAREL, etc., Claimant

STATEMENT

1927.
June 20. Stipulation for Libellant's Costs.
June 20. Libel filed.
June 29. Answer to Libel and Interrogatories filed.

1929.
May 9. Trial—Woolsey, J., and concluded.
August 28. Opinion filed.
Sept. 20. Interlocutory Decree entered.

1930.
April 14. Final Decree entered.
April 25. Order Resettling Decree filed.
April 25. Claimant's Exceptions to Commissioner's Report filed.
May —. Assignments of Error filed by claimant to finding and decree.
May 15. Notice of Appeal filed.

[fol. 2] IN UNITED STATES DISTRICT COURT

STIPULATION FOR LIBELLANT'S COSTS

Stipulation for Libellant's Costs Entered Into Pursuant to the Rules and Practice of this Court

Whereas, a libel will be filed in this Court on or about June 18th, 1927, by William Stevens against the vessel "White City," her engines, etc., for the reasons and causes in said libel mentioned; and praying that process may issue

against the said vessel and all persons claiming to have an interest therein may be cited to appear and answer, and the said libellant and George B. Ogden and Allen H. Kerr, stipulators, parties hereto, hereby consenting and agreeing that in case costs are awarded against said libellant or said stipulators, the decree therefor not exceeding the sum of Two hundred and fifty dollars ($250.00) may be entered against them and each of them, and thereupon execution may issue against their and each of their goods, chattels, lands and tenements, or other real estate.

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern, that the libellant herein and the stipulators undersigned, George B. Ogden residing at 122 East 72nd Street, New York City, and by occupation insurance business, and Allan H. Kerr, residing at 151 East 79th Street, New York City, and by occupation insurance business, and each of them is hereby bound in the sum of Two hundred and fifty dollars ($250.00) conditioned [fol. 3] that they shall pay all costs and expenses which shall be awarded against said libellant and or the stipulators undersigned or any of them by decree of this Court.

George B. Ogden, A. H. Kerr.

Taken and acknowledged this 20th day of June, 1927, before F. L. Queren, Notary Public. Kings County Cl'k's No. —. Certificate filed in N. Y. Co. Cl'k's No. 10. Kings County Register's No. 8004. New York County Register's No. 8010. Commission expires March 30, 1928.

SOUTHERN DISTRICT OF NEW YORK, ss:

George B. Ogden and Allan H. Kerr, the foregoing stipulators, being duly sworn, each deposes and says that he resides as heretofore set forth and that he is worth the sum of Five hundred dollars ($500.00) over and above all his debts and liabilities.

George B. Ogden, A. H. Kerr.

Sworn to before me this 20th day of June, 1927. F. L. Queren, Notary Public. Kings County Cl'k's No. —. Certificate filed in N. Y. Co. Cl'k's No. 10. Kings County Register's No. 8004. New York County Register's No. 8010. Commission expires March 30, 1928.

[fol. 4] IN UNITED STATES DISTRICT COURT

LIBEL

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libel and complaint of William Stevens against the vessel "White City," her engines, tackle, apparel and furniture and against all persons intervening for their interest therein in a cause of contract civil and maritime, alleges upon information and belief:

First. That the vessel "White City" now is and during the currency of process herein will be within the jurisdiction of the United States and of this honorable Court.

Second. That at all of the times hereinafter mentioned libellant's assignor T. C. Frost was the owner of the yacht "Drifter."

Third. That on or about October 19, 1925, as hereinafter set forth, at Morris Heights in New York City there was delivered in good order and condition by the Consolidated Shipbuilding Corporation to the boat "White City" a newly constructed yacht "Drifter" to be towed by the said "White City" to the Trans-Marine Pier at Port Newark, N. J., and there delivered before three p. m. on said date in like good order and condition in consideration of the towage charges paid or agreed to be paid.

Fourth. That the said boat "White City" left Morris Heights, New York City, shortly after eleven o'clock in the morning of October 19, 1925, with the said yacht "Drifter" and a cradle in tow and proceeded down the Harlem River. [fol. 5] Thereafter the said "White City" in violation of the agreement aforesaid instead of proceeding with her tow to Port Newark, N. J., proceeded to Fisher's Dock, N. J., and there tied up for the night. The said "White City" with her tow arrived at the Trans-Marine Pier at Port Newark, N. J., at about eight o'clock on the morning of October 20, 1925, but the said vessel did not deliver the yacht "Drifter" in good order and condition but on the contrary delivered the said yacht "Drifter" in a grievously damaged condition, necessitating repairing a hole in the

starboard side of said yacht, repairing the stem and necessitating repainting and re-varnishing and the making of other repairs and incurrance of sundry expenses and the damage to said boat was found to amount to the sum of Eight hundred and ten dollars and eighty-one cents ($810.81).

Fifth. That heretofore and prior to the commencement of this action the said T. C. Frost for a valuable consideration duly transferred and assigned to the libellant herein all his rights arising from the damage to the said yacht "Drifter" including the foregoing cause of action.

Sixth. That by reason of the foregoing, libellant has been damaged in the sum of Eight hundred ten dollars and eighty-one cents ($810.81).

Seventh. That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this honorable Court.

Wherefore libellant prays:

1. That process in due form of law and according to the practice of this honorable Court in matters of Admiralty [fol. 6] and Maritime jurisdiction may issue against the vessel "White City," her engines, etc., and that all persons claiming to have an interest therein may be cited to appear and answer under oath the matter set forth herein.

2. That the Court will be pleased to decree to the libellant recovery herein together with interest thereon and the costs and disbursements of this suit.

3. That the said vessel "White City," her engines, etc., may be condemned and sold to pay the same.

4. That the Court will grant to the libellant such other and further relief as may be just in the premises.

Neil P. Cullom, Proctor for Libellant. Office and P. O. address: No. 165 Broadway, Borough of Manhattan, City of New York.

[fol. 7] *Duly sworn to by William Stevens. Jurat omitted in printing.*

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

RESPONDENTS' ANSWER AND INTERROGATORIES

To the Hon. John C. Knox, Judge of the District Court of the United States for the Southern District of New York:

The answer of Herbert N. Simpson and William A. Rhodes, sole and exclusive owners of the vessel "White City," her engines, etc., to the libel of William Stevens, against said vessel "White City," in a cause of contract, civil and maritime, and said respondents allege and propound as follows:

First. Admit that the said vessel "White City" now is and during the currency of process herein will be within the jurisdiction of the United States and of this honorable Court as alleged in article marked "First" of the libel herein and further allege and admit that said respondents are the true, bonafide and exclusive owners of said vessel "White City," her engines, etc., and became such under and pursuant to a bill of sale of enrolled vessel duly executed by George L. Schmidt, the previous owner thereof, and that said bill of sale is recorded in the United States [fol. 9] Custom House at New York and was so recorded on September 9th, 1921, in Book No. 154-A at pages 56 and 57 and that no other person or entity has any interest in said boat.

Second. The respondents have no knowledge or information sufficient to form a belief, except as stated in said libel in article marked "Second" thereof that "at all of the times hereinafter mentioned libellant's assignor T. C. Frost was the owner of the yacht "Drifter," and said respondents therefore leave the libellant to make such proof of his allegation as he may be advised with respect to the said ownership of said yacht "Drifter" by said T. C. Frost and the date when the same first became effective.

Third. That the matters and things in article marked "Third" of said libel set forth are in great part untrue and falsely alleged and respondents therefore deny the truth

of each of the allegations therein made, except so far as they may hereafter be admitted to be true and respondents therefore leave the libellant to make such proof of his allegations as he may be advised.

Fourth. That the matters and things in article "Fourth" of said libel set forth are in great part untrue and falsely alleged and respondents therefore deny the truth of each of the allegations therein made, except so far as they may hereafter be admitted to be true and respondents therefore leave the libellant to make such proof of his allegations as he may be advised.

Fifth. The respondents further answering articles marked "Third" and "Fourth" in said libel herein, and as a separate defense, allege the facts to be as follows and not otherwise:

[fol. 10] That they are the truth, bonafide and exclusive owners of the boat referred to in the libel herein as the "White City" and have been such owners and in possession thereof since on or about September 9th, 1921; that it is not and never was a tow-boat and was built, used and solely adopted for pleasure purposes, for private use, excursions and conveying passengers on pleasure trips and outings and that the construction and appearance of said boat made it obvious on inspection that it was and could be used only for such purposes. That on or about October 19th, 1925, the Consolidated Shipbuilding Corporation, located at Morris Heights, on the Harlem River, New York City, employed said respondents, Hrebert N. Simpson and William A. Rhodes, to convey a forty-five foot launch known as the "Drifter" referred to in said libel, and a cradle therefor, from said Morris Heights to the Trans-Marine Steamship Co. at Port Newark, N. J.: That pursuant to said request said respondents appeared off the shipyard of said Consolidated Shipbuilding Corporation with their said boat "White City" in and on the Harlem River about 8 A. M. on the said date, October 19th, 1925, and reported to said Consolidated Shipbuilding Corporation and that in about twenty minutes thereafter the said Consodilated Shipbuilding Corporation through its agents and employees towed said "Drifter" out into said river where said respondents were waiting and thereupon said agents and employees of said Consolidated Shipbuilding

Corporation took possession of respondents' boat and assumed and exercised control and direction over respondents, respondents' boat and said "Drifter" and cradle thereto attached, from that time until the said "Drifter" and [fol. 11] cradle were delivered to Port Newark, N. J., on October 20th, 1925. Said agents and employees with the aid of said respondents at about 8:20 A. M. on October 19th, 1925, in said Harlem River opposite the shipyard of said Consolidated Shipbuilding Corporation by means of two ropes about one and one-fourth inches thick and about fifty feet long attached said "Drifter" to said "White City" and also attached said "Drifter" to said cradle by two ropes about three-fourths of an inch thick and about thirty feet long and thereupon directed said respondents to proceed with said "White City," "Drifter" and cradle to said Port Newark, N. J.. That present on said trip were the said respondents on the "White City" and an agent and employee of said Consolidated Shipbuilding Corporation on the "Drifter" and that said respondents complied in all respects with the directions of said Consolidated Shipbuilding Corporation, through its agents and employee and conveyed said "Drifter" and cradle to the said Port Newark, N. J., arriving there at about 7:30 A. M. on October 20th, 1925, and delivered said boat "Drifter" and said cradle to the destination fixed and directed by said Consolidated Shipbuilding Corporation, its agents and employees, in the condition that said boat and cradle were at the time the trip was started and at the time of said delivery no statement or objection was made by or on behalf of anybody at Port Newark, N. J., and thereupon said respondents left the waterfront at Port Newark, N. J., and went to breakfast and returned in about an hour thereafter; that before said respondents left for breakfast the Trans-Marine Steamship Co. took possession of said "Drifter" and cradle and proceeded and did raise said [fol. 12] cradle and also proceeded to raise said "Drifter" from the waters at Port Newark, N. J., by means of rope-slings thereto attached and if there were any injury to said "Drifter" or cradle it occurred after the delivery by said respondents as so directed and said respondents at all times while in the employ of said Consolidated Shipbuilding Corporation and from the time said "Drifter" and cradle were attached as aforesaid, proceeded with due

care, skill and caution and without any neglect on their part and continued to do so until the delivery of said "Drifter" and cradle were completed at said Port Newark, N. J. That at all times said "Drifter" and cradle were in the care, custody and control of said Consolidated Shipbuilding Corporation, its agents and employees and said respondents pursued the course and all the things directed or requested by said Consolidated Shipbuilding Corporation and that said Consolidated Shipbuilding Corporation assumed and was responsible for said "Drifter" and cradle from the starting of said trip to the delivery of said "Drifter" and cradle as aforesaid and said respondents were the agents and employees at all times herein set forth of said Consolidated Shipbuilding Corporation and were never employed and never had any dealings with said libellant or the libellant's assignor, said T. C. Frost, and as herein and heretofore alleged said respondents deny the allegations and statements contained in said libel. The respondents further beg leave to here note as part of this answer, that the waters intervening between the shipyards of the Consolidated Shipbuilding Corporation, at Morris Heights, New York, on the Harlem River, where said "Drifter" and cradle were so attached to the "White City," and Port Newark, N. J., are navigable waters under [fol. 13] the immediate and exclusive jurisdiction of the States of New York and New Jersey and the United States and that all of these waters are affected by the ocean tides and that driftwood and other loose and uncontrolled bodies and substances are present therein both day and night and in this connection the said Consolidated Shipbuilding Corporation was advised not to attempt to deliver the said "Drifter" through said waters on the day the attempt was made as there were dangers arising from the tide being against said "White City," said "Drifter" and said cradle; that there would be "hard pulling and that you would get all the driftwood against you, you are forcing up against the driftwood; the condition is against you all the way;" this refers to the 18th day of October, 1925. The day advised for the delivery of said "Drifter" was the day following the date that the delivery was attempted when the tide and conditions would be better; this advice was given by Alexander Simpson, the father of the respondent Herbert N. Simpson, who was a

boatman of many years experience and familiar with the waters, tides and perils of the sea; this advice was given to Mr. William A. Roos who had charge of such matters on behalf of the Consolidated Shipbuilding Corporation. The said Consolidated Shipbuilding Corporation acted contrary to such advice and directed that the delivery be attempted on the date referred to herein; to wit: October 19th, 1925. Said "Drifter" is a lightly constructed pleasure boat not intended for navigation on the Harlem River and intervening waters between said river and Port Newark, N. J. The sides of said "Drifter" were not substantial and were unprotected by the Consolidated Shipbuild-[fol. 14] ing Corporation and its agents from contract with floatwood and other substantial floating substances in said waters. The only attempted precaution taken by the Consolidated Shipbuilding Corporation was the placing of one of its employees, Captain Watson, on said "Drifter" and at all times was in immediate charge thereof and also of said cradle. The only engagement that the respondents had in the premises was to furnish the power to propel the "White City" and draw said "Drifter" and cradle attached to the "White City" by extending ropes therefrom as above set forth and this engagement made no provision for the insurance of said "Drifter" or cradle during the conveyance thereof as above set forth; had there been any statements, conversation or engagement with respect to the protection of said "Drifter" and cradle by insurance respondents herein would have insisted on such insurance or refuse to accept the engagement. Respondents did the work referred to with their pleasure and excursion boat as a convenience to the Consolidated Shipbuilding Corporation for about one-half the price it would otherwise cost. The amount received by said respondents for such services and paid by said Consolidated Shipbuilding Corporation amounted to $75.00. Respondents are advised and charge the truth to be that said "Drifter" and said cradle were insured either in the name of the Consolidated Shipbuilding Corporation, the manufacturer thereof, or said T. C. Frost, against any damage that might arise by reason of the same being transferred through said waters from said shipyards to Port Newark, N. J., and that the company so insuring said "Drifter" and said cradle has paid them or either of them for any and all damage arising from the

[fol. 15] alleged injury to said "Drifter" referred to in the libel herein long before the commencement of the above entitled action and long before the action hereinafter referred to brought by said libellant in the Municipal Court of the City of New York, Borough of Manhattan, was commenced and that said T. C. Frost had no claim or cause of action to assign to the libellant herein. The respondents while conveying said "Drifter" on the 19th day of October, 1925, to said Port Newark, N. J., and about 3:30 P. M. on said date and while going through and around Bergen Point and entering Newark Bay sighted the steamer Suscalanco going to sea; this was the steamer on which said "Drifter" and cradle were to be shipped; on seeing the said steam- coming through without cargo said respondents were suddenly confronted with an emergency and for a time were at a loss to determine what to do in the premises; after some thought respondents concluded it was best to pull into the nearest dock and make the tow fast and proceed by telephone or otherwise to be further advised; they did telephone to the Consolidated Shipbuilding Corporation but no one was present except a watchman and respondents could not get in touch with any official of said company; respondents soon thereafter telephoned to Mr. Alexander Simpson, the father of said respondent Herbert N. Simpson, to his boathouse on the Hudson River, Mr. Simpson being then on friendly and business relations with the Consolidated Shipbuilding Corporation and had extensive experience in the boat business; Mr. Alexander Simpson informed respondents that the orders of transportation with respect to the "Drifter" and the cradle had been changed and that instead of being shipped on the [fol. 16] Susholenco the same would be shipped on the Suboatzo due to sail the following morning and that the instructions were that said respondents continue on the next morning; these instructions were given by the shipping clerk of the Consolidated Shipbuilding Corporation; whereupon respondents made the tow fast and secure to stay overnight; at this point the employee of the Consolidated Shipbuilding Corporation, Captain Watson, left; the place where said respondents tied up the tow was Fisher's Dock and respondents carefully protected the "White City," the "Drifter" and the cradle while so tied; when said respondents completed the inquiries above referred to

and attended to the details narrated it became dark and by reason of all the circumstances they deemed it best not to proceed further on the trip until daylight the following morning and about 7:00 A. M. on the following morning they proceeded up Newark Bay to the Trans-Marine Steamship Company, the point of destination, bringing the "Drifter" and cradle alongside of the steamer on which they were to be shipped and delivered the "Drifter" and cradle to said Trans-Marine Steamship Company and went to their breakfast; respondents had nothing further to do with said "Drifter" and cradle.

Sixth. The respondents have no knowledge or information sufficient to form a belief, except as stated in said libel in article marked "Fifth" thereof and therefore deny the same and said respondents therefore leave the libellant to make such proof of his allegation in said article marked "Fifth" *and* he may be advised and on information and belief said respondents deny that T. C. Frost for a valuable consideration transferred and assigned to the libel-[fol. 17] lant herein his rights arising from the damage to said yacht "Drifter" and deny that said T. C. Frost had any rights as referred to in article marked "Fifth" of the libel herein to assign to said libellant.

Seventh. The respondents have no knowledge or information sufficient to form a belief as to the allegations in article marked "Sixth" thereof and said respondents therefore deny the same and therefore leave the libellant to make such proof of his allegations in said article marked "Sixth" as he may be advised and any damages suffered by the libellant were in no manner due to any fault of said vessel "White City," her engines, etc., or the owner, master or crew, but the same were due entirely to the fault and management of those in charge of said "Drifter" and that the owner of said "Drifter" and said Consolidated Shipbuilding Corporation were in fault in the following among other particulars:

a. They did not have present on the "Drifter" sufficient employees to protect the same;

b. They placed no guards or covering on the exterior of said "Drifter" to guard against the perils of the sea,

floatwood and other floating bodies in the waters through which it was towed;

c. The manner in which said "Drifter" and cradle were tied to the "White City" by long ropes unguarded and unprotected were inadequate to meet the perils of the sea;

[fol. 18] d. That contrary to the express advice of Alexander Simpson, a seaman and boatman with expert qualifications in these respects, they directed the conveyance of said "Drifter" and cradle on a date and time when the tide, currents, driftwood and other floating bodies constituted a maximum condition of peril to the safety of said "Drifter" and cradle;

e. That the owner and the said Consolidated Shipbuilding Corporation should have employed a tug instead of a pleasure and excursion boat to convey said "Drifter" and cradle;

Eighth. The respondents deny the allegations contained in article marked "Seventh" of the libel herein, and the facts on which this denial is based are as follows:

That long prior to the filing of the libel in the above entitled action the said libellant William Stevens brought an action in the Municipal Court of the City of New York, Borough of Manhattan, in the First District thereof, which action was transferred to the Seventh District and there tried; that in said action said William Stevens was the plaintiff and the respondents herein were defendants and in said action in said Municipal Court the same subject matter and the same cause of action set forth in the libel herein was tried and determined resulting in an order and judgment in favor of said respondents and against said libellant dismissing said cause of action on the merits and that the time within which said William Stevens could appeal from said order and judgment expired a long time before the filing of the libel in this action and said order and judgment between the same parties on the [fol. 19] same subject matter constitute a bar to the above entitled action now pending in the United States District Court of the Southern District of New York, now brought in the name of William Stevens, libellant, against Steamship "White City," her engines, etc.

Respondents, for a further answer and defense and as a bar to the alleged cause or causes of action set forth in the libel herein verified by the libellant on June 20th, 1927, alleges and shows to the Court:

Ninth. That the real parties to this action wherein said William Stevens is libellant and the Steamship "White City", her engines, etc., are respondents are in truth and in fact said William Stevens as libellant and said respondents Herbert N. Simpson and William A. Rhodes, the sole, true and bonafide owners of said "White City" as more fully appears from their verified claim filed herein and also as appears from this answer and from the bill of sale of enrollment referred to herein and other proofs hereinafter referred to, and said respondents were such owners on September 9th, 1921, and are and at all times since said date have been in possession thereof. On the dates hereinafter mentioned said William Stevens as plaintiff brought an action against said Herbert N. Simpson and William A. Rhodes as defendants in the Municipal Court of the City of New York, Borough of Manhattan, Seventh District, and such steps were taken therein as resulted in the trial, order and judgment and final disposition thereof on the identical subject matter set forth in the libel herein, which order and judgment were in [fol. 20] favor of the said respondents and against said libellant and finally adjudicated said matter of difference, and the facts in that respect are as follows:

Said action in which William Stevens was plaintiff in the Municipal Court of the City of New York to recover on the cause of action now set forth in the libel herein was originally started against Alexander Simpson and the summons and complaint therein served on Alexander Simpson on March 27th, 1926. Said Alexander Simpson appeared by the attorney for the respondents in this action and served his answer containing a general denial on April 1st, 1926. At this time the respondents Herbert N. Simpson and William A. Rhodes were not included in the action in the Municipal Court. The plaintiff William Stevens not having started the action in the right district in the Municipal Court, the same was transferred to the Seventh District on application of the defendant Alexander Simpson.

Thereafter and on May 11th, 1926 a motion was made by said William Stevens in the action in which he was plaintiff and Alexander Simpson sole defendant in said Municipal Court of the City of New York for an order directing the joinder of said Herbert N. Simpson and William A. Rhodes as parties defendants in said action in said Municipal Court and for leave for said plaintiff to serve a supplemental summons and amended complaint therein and in the affidavit on which said motion was based, sworn to by said William Stevens on May 7th, 1926, he defines and describes said action as follows:

"This action was instituted by me for the recovery of damage sustained by the motor boat 'Drifter' which [fol. 21] was towed by the tow-boat 'White City' from Morris Heights, New York to Port Newark, N. J., on or about October 19th, 1925."

Said William Stevens in said affidavit farther stated that said Alexander Simpson was examined before trial on April 16th, 1926 and, at that time submitted to Mr. Gregory S. Rivkins, an attorney associated with Neil P. Cullom, counsel for said William Stevens, certain bills of sale showing that title of the boat "White City" was conveyed from George L. Schmidt to Herbert N. Simpson and William A. Rhodes on September 9th, 1921: In said affidavit of said Stevens he states that he read the affidavits of said Herbert N. Simpson and William A. Rhodes sworn to April 2nd, 1926, in which they swear that they were the joint and equal owners of the boat known as "White City" under and pursuant to said bills of sale entered of record in the United States Customs House, Borough of Manhattan, in Book 154-A and the affidavit of said Stevens continues to quote from said respondents' affidavit as follows:

"That on or about October 19th, 1925, they (Herbert Simpson and William A. Rhodes) were employed by the Consolidated Shipbuilding Corporation, whose plant is located on the Harlem River opposite the speedway to tow a boat called 'Drifter' from the shipyard of said Consolidated Shipbuilding Corporation to Port Newark, in the State of New Jersey, at which point said Consolidated Shipbuilding Corporation was to make delivery of said boat 'Drifter'."

[fol. 22] That said motion of said plaintiff to join the respondents Herbert Simpson and William A. Rhodes as defendants in said action in the Municipal Court was granted by Hon. Frederick Spiegelberg, one of the Justices of said Municipal Court and the order is dated May 17th, 1926, and under and pursuant to said order said William Stevens as plaintiff caused to be served upon said Herbert Simpson and William A. Rhodes a supplemental summons dated May 12th, 1926 and a verified amended complaint sworn to by said William Stevens on May 13th, 1926. The title of said action in said supplemental summons is as follows:

"MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF MANHATTAN, FIRST DISTRICT

WILLIAM STEVENS, Plaintiff,

against

ALEXANDER SIMPSON, HERBERT SIMPSON, and WILLIAM A. RHODES, Defendants

Hereto attached and marked 'Respondents' Exhibit A' is copy of the order bringing in said respondents as defendants in said Municipal Court action and also copy of the supplemental summons and verified complaint; all of which papers were served on said defendants by said plaintiff.

[fol. 23] Thereafter the defendants therein appeared in said action and in due course served their verified answer to said amended complaint, and in due course the issue so joined was tried in said Municipal Court, Seventh District, Part I, on or about December 7th, 1926 and at the close of the trial thereof plaintiff's amended complaint was dismissed as against said Herbert Simpson and William A. Rhodes and an order and judgment to that effect duly entered therein and the time for said William Stevens to appeal therefrom has long since expired and no appeal has been taken and said order and judgment are in full force and effect and constitute a bar to the present action brought by said libellant and the matters in issue therein have been duly adjudicated and are res adjudicata forever concluding and binding on said libellant and these respondents.

The answer of said Herbert N. Simpson and William A. Rhodes with the pleadings therein on the part of the plaintiff are made part of this answer. The said answer to said amended complaint is hereto annexed and marked 'Respondents' Exhibit B'."

Tenth. That the libel as a whole does not state any cause of action, and said respondents except thereto.

Eleventh. To the article marked "Fourth" in said libel these respondents except in this that they are advised that no facts or acts are stated therein sufficient to constitute a cause of action.

a. That if said article intends to state a cause of action under the law of common carrier, that no facts or acts [fol. 24] are stated therein sufficient to constitute such a cause of action;

b. That no facts or acts are stated therein sufficient to constitute an action in negligence.

Twelfth. That the matters and things set forth in said libel and the whole thereof constitute identical subject matter between the same parties and that the same were adjudicated in a prior action between the same parties on the same subject matter in said Municipal Court of the City of New York, and further that the said libellant William Stevens may be required to answer interrogatories hereto annexed.

All and singular the premises are true.

Wherefore the respondents prays that the Court would be pleased to pronounce against the libel aforesaid; and to condemn the libellant in costs, and otherwise right and justice to administer in the premises.

Dated June 29th, 1927.

Florence J. Sullivan, Attorney and Proctor for Respondents. Office and P. O. Address: 27 Cedar Street, Borough of Manhattan, City of New York.

[fol. 25] Interrogatories

Interrogatories to be Answered by William Stevens, Libellant Herein, in Writing and Under Oath in Pursuance of the Rules and Practice in Causes of Admiralty and Maritime Jurisdiction

1. State whether or not you are the William Stevens referred to in "Respondents' Exhibits A and B" attached to and made part of respondents' answer herein.

2. State whether or not the Herbert Simpson and William A. Rhodes appearing herein in answer to your libel are the same Herbert Simpson and William A. Rhodes referred to as defendants in said "Respondents' Exhibits 'A' and 'B' " attached to their answer herein.

3. Did you personally pay anything for the alleged assignment from T. C. Frost to you referred to in the libel herein?

4. What is your profession or business?

5. Are you the William Stevens who wrote a letter to Mr. Alexander Simpson under date of December 1st, 1925, signing your name as attorney for Chubb & Son of No. 5-7 South William Street, New York City?

6. Is the firm of Chubb & Son an insurance company or brokers?

7. Did Chubb & Son as principal or agent issue policy of insurance on the boat "Drifter" covering its passage [fol. 26] from the shipyards of the Consolidated Shipbuilding Corporation at Morris Heights, New York City, to Port Newark, N. J., on or about October 19th, 1925?

8. If your last answer is in the affirmative, did that policy cover the damages that said libel alleges and was such insurance paid and to what amount and to whom?

9. Was your libel intended to be drawn against the respondents within the law relating to common carrier?

10. Was your libel intended to be drawn against the respondents within the law relating to negligence?

11. If your answer is "No" to the last two questions, state what is your understanding as to the character of the action attempted to be set forth in your libel?

[fol. 27] RESPONDENTS' EXHIBIT "A"

At a stated term of the Municipal Court of the City of New York, Borough of Manhattan, First District, held at the court-house, 146 Grand Street, New York City, on the 17th day of May, 1926.

Present: Hon. Frederick Spiegelberg, Justice.

WILLIAM STEVENS, Plaintiff,

against

ALEXANDER SIMPSON, Defendant

The plaintiff having moved this Court for an order permitting the joinder of Herbert Simpson and William A. Rhodes as parties defendant in this action, and for leave to serve a supplemental summons and amended complaint herein, now on reading the notice of motion, dated May 7th, 1926, and the affidavit of William Stevens, sworn to May 7th, 1926, with due proof of service thereof on defendant's attorney, the summons and complaint verified March 27th, 1926, the answer verified April 1st, 1926, and after hearing Gregory S. Rivkins, Esq., of counsel with Neil P. Cullom, attorney for the plaintiff, in support of said motion, and Florence J. Sullivan, Esq., attorney for the defendant, in opposition thereto, and due deliberation having been had thereon, and on filing the opinion of the Court, it is

[fol. 28] Ordered, that the said motion be and the same hereby is in all respects granted; and it is

Further ordered:

1. That the complaint and all the papers and proceedings be and the same hereby are amended by adding as defendants herein Herbert Simpson and William A. Rhodes;

2. That the plaintiff be and he hereby is allowed to file and serve the annexed amended complaint, and that the

said annexed amended complaint stand as the complaint herein;

3. That a supplemental summons issue herein, as annexed hereto, directed to the parties who are added as defendants by virtue of the provisions of this order, to the end that they may be brought in as parties defendant in this action;

4. That the defendant Alexander Simpson herein and the said Herbert Simpson and William A. Rhodes have the usual time to answer the amended complaint after service thereof.

Enter.

F. S., J. M. C.

[fol. 29] MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF MANHATTAN, FIRST DISTRICT

WILLIAM STEVENS, Plaintiff,

against

ALEXANDER SIMPSON, HERBERT SIMPSON, and WILLIAM A. RHODES, Defendants

Supplemental Summons

To the above-named defendants:

You are hereby summoned to appear in this action in the Municipal Court of the City of New York, Borough of Manhattan, First District, before the Clerk of the said Court at his office at 146 Grand Street, in the Borough of Manhattan, in the City of New York, within five days after the service of this supplemental summons upon you, exclusive of the day of service, and to make answer to the amended complaint; and if you fail to make answer, judgment will be taken against you for the sum of $847.31, with interest thereon from the 19th day of October, 1925, together with the costs of this action.

Dated New York City, the 12th day of May, 1926.

Neil P. Cullom, Attorney for Plaintiff. Office and P. O. address: 165 Broadway, New York City.

[fol. 30] MUNICIPAL COURT OF THE CITY OF NEW YORK,
BOROUGH OF MANHATTAN, FIRST DISTRICT

WILLIAM STEVENS, Plaintiff,

against

ALEXANDER SIMPSON, HERBERT SIMPSON, and WILLIAM A. RHODES, Defendants

Amended Complaint

The plaintiff for his amended complaint in the above entitled action by his attorney, Neil P. Cullom, respectfully shows to this Court and alleges upon information and belief:

First. That at all the times hereinafter mentioned, plaintiff's assignor, T. C. Frost, was the owner of the Motor-Boat "Drifter", and the defendants were the owners and in possession of the Tow Boat "White City".

Second. That on or about October 19th, 1925, at Morris Heights, New York, the defendants received, in good order and condition, from the Consolidated Shipbuilding Corporation, the said Motor Boat "Drifter", to be towed by the defendants' tow boat "White City" to Port Newark, New Jersey.

Third. That in consideration of towage charges paid or agreed to be paid to them, the defendants agreed to tow [fol. 31] and to deliver the said Motor Boat "Drifter" safely, in like good order and condition, and the said defendants received the said Motor Boat for the uses and purposes aforesaid.

Fourth. That in violation of their said agreement, the defendants failed and neglected to deliver said Motor Boat "Drifter" in good order and condition at Port Newark, N. J., but on the contrary, in consequence of the careless, negligent, improper and unskillful management by the defendants and or their agents of the said Tow Boat "White City", the said Motor Boat "Drifter" was seriously damaged and was delivered in a damaged condition at Port Newark, N. J.

Fifth. That thereafter T. C. Frost, the owner of the said Motor Boat "Drifter", duly assigned and transferred to the plaintiff herein all his right, title and interest arising from the damage to the said Motor Boat "Drifter", including the foregoing cause of action.

Sixth. That by reason of the foregoing, plaintiff has been damaged in the sum of Eight hundred forty-seven dollars and thirty-one cents ($847.31).

Seventh. That plaintiff is in doubt as to which of the defendants is liable and, therefore, under Sections 213 and 219 of the Civil Practice Act, joins them all to the intent that the Court may determine which of the said defendants or all of them are liable.

Wherefore plaintiff demands judgment against whichever of the defendants shall be found liable therefor, in the said [fol. 32] sum of $847.31, with interest thereon from October 19th, 1925, together with the costs and disbursements of this action.

Neil P. Cullom, Attorney for Plaintiff. Office and P. O. Address: No. 165 Broadway, Borough of Manhattan, New York City.

STATE OF NEW YORK,
County of New York, ss:

William Stevens, being duly sworn, deposes and says; that he is the plaintiff in the above entitled action; that he has read the foregoing amended complaint and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

William Stevens.

Sworn to before me this 13th day of May, 1926. Arthur Geyen, Notary Public, Bronx Co., No. 18. Certificate filed in N. Y. Co. 84. N. Y. Co. Register's No. 8089. Comm. expires March 30, 1928.

[fol. 33] RESPONDENTS' EXHIBIT "B"

MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF MANHATTAN, FIRST DISTRICT

WILLIAM STEVENS, Plaintiff,

against

ALEXANDER SIMPSON, HERBERT SIMPSON, and WILLIAM A. RHODES, Defendants

The defendants, Herbert Simpson and William A. Rhodes, appearing herein by their attorney, Florence J. Sullivan, for their answer to the amended complaint herein, allege and show to the Court:

First. They deny any knowledge or information sufficient to form a belief as to the allegations and statements contained in a paragraph marked "First" of the amended complaint wherein it is alleged "that at all times herein mentioned plaintiff's assignor T. C. Frost was the owner of the motor boat "Drifter" and defendants admit so much of said paragraph as alleges that they were the owners and in possession of the boat known as "White City" and deny that it is or was a tow-boat.

Second. Defendants deny the allegations and statements contained in paragraphs marked "Second", "Third" and "Fourth" of plaintiff's amended complaint.

[fol. 34] Third. Defendants deny any knowledge or information sufficient to form a belief as to the allegations and statements contained in paragraphs marked "Fifth", "Sixth" and "Seventh" of plaintiff's amended complaint.

Fourth. Defendants allege on information and belief that plaintiff is not the real party in interest in the above entitled action and is not the owner of the alleged cause of action set forth in the amended complaint and that the alleged assignment of said alleged cause of action was without consideration.

For a separate and further answer and defense to the alleged cause of action set forth in the amended complaint, defendants allege:

Fifth. That they are the owners of the boat referred to in the amended complaint herein as the "White City" and have been such owners and in possession thereof since on or about September 9th, 1921; that it is not and never was a tow-boat and was built, used and solely adopted for pleasure purposes, for private use, excursions and conveying passengers on pleasure trips and outings and that the construction and appearance of said boat made it obvious on inspection that it was and could be used only for such purposes: That on or about October 19th, 1925, the Consolidated Shipbuilding Corporation, located at Morris Heights, on the Harlem River, New York City, employed said defendants, Herbert Simpson and William A. Rhodes, to convey a forty-five foot launch known as the "Drifter" referred to in the said amended complaint and a cradle [fol. 35] therefor from said Morris Heights to the Trans-Marine Steamship Co. at Port Newark, N. J. That pursuant to said request said defendants appeared off the shipyard of said Consolidated Shipbuilding Corporation with their said boat "White City" in and on the Harlem River about 8 A. M. on the said October 19th, 1925 and reported to said Consolidated Shipbuilding Corporation and that in about twenty minutes thereafter the said Consolidated Shipbuilding Corporation through its agents and employees towed said "Drifter" out into said river where said defendants were waiting and thereupon said agents and employees of said Consolidated Shipbuilding Corporation took possession of defendants' boat and assumed and exercised control and direction over defendants, defendants' boat and said "Drifter" and cradle thereto attached from that time until the said "Drifter" and cradle were delivered to Port Newark, N. J., on October 20th, 1925. Said agents and employees with the aid of said defendants at about 8:20 A. M. on October 19th, 1925 in said Harlem River opposite the shipyard of said Consolidated Shipbuilding Corporation by means of two ropes about one and one-fourth inches thick and about fifty feet long attached said "Drifter" to said "White City" and also attached said "Drifter" to said cradle by two ropes about three-fourths of an inch thick and about thirty feet long and thereupon directed said defendants to proceed with said "White City", "Drifter" and cradle to said Port Newark, N. J. That present on said trip were the said defendants on the "White City" and an

agent and employee of said Consolidated Shipbuilding Corporation on the "Drifter" and that said defendants com- [fol. 36] plied in all respects with the directions of said Consolidated Shipbuilding Corporation, through its agent and employee and conveyed said "Drifter" and cradle to the said Port Newark N. J., arriving there at about 7:30 A. M. on October 20th, 1925, and delivered said boat "Drifter" and said cradle to the destination fixed and directed by said Consolidated Shipbuilding Corporation, its agents and employees, in the condition that said boat and cradle were at the time the trip was started and at the time of said delivery no statement or objection was made by or on behalf of anybody at Port Newark, N. J., and thereupon said defendants left the waterfront at Port Newark, N. J. and went to breakfast and returned in about an hour thereafter; that before said defendants left for breakfast the Trans-Marine Steamship Co. took possession of said "Drifter" and cradle and proceeded and did raise said cradle and also proceeded to raise said "Drifter" from the waters at Port Newark, N. J. by means of rope-slings thereto attached and if there were any injury to said "Drifter" or cradles it occurred after the delivery by said defendants as so directed and said defendants at all times while in the employ of said Consolidated Shipbuilding Corporation and from the time said "Drifter" and cradle were attached as aforesaid, proceeded with due care, skill and caution and without any neglect on their part and continued to do so until the delivery of said "Drifter" and cradle were completed at said Port Newark, N. J. That at all times said "Drifter" and cradle were in the care, custody and control of said Consolidated Shipbuilding Corporation, its agents and employees and said defendants pursued the course and all the things directed or requested by said Consolidated Shipbuilding Corporation and that said [fol. 37] Consolidated Shipbuilding Corporation assumed and was responsible for said "Drifter" and cradle from the starting of said trip to the delivery of said "Drifter" and cradle as aforesaid and said defendants were the agents and employees at all times herein set forth of said Consolidated Shipbuilding Corporation and were never employed and never had any dealings with said plaintiff or the plaintiff's assignor, said T. C. Frost, and as herein and here-

tofore alleged said defendants deny the allegations and statements contained in said amended complaint.

Sixth. Defendants demand a jury trial of the above entitled action and demand a jury of twelve jurors.

Seventh. Defendants allege that at the time of the commencement of this action, during all the times herein set forth and long prior thereto they were and are continuous residents in the Seventh District of the Municipal Court of the City of New York and that said defendant William A. Rhodes was and is for the past eight years a resident of said Seventh District, residing at West 151st Street and North River and that there is no street number of his residence and that said defendant Herbert Simpson alleges that at the commencement of this action and at all times herein set forth and continuously for twenty-four years last past he was and is a resident of West 151st Street and North River, which location is in the Seventh District, Municipal Court of the City of New York, Borough of Manhattan, and that there is no street number of said residence and said defendants and each of them hereby demand that the place [fol. 38] of trial in the above entitled action be changed from the First District to the Seventh District, Municipal Court of the City of New York, Borough of Manhattan.

Eighth. Said defendants and each of them allege on information and belief that said plaintiff is not a resident of said First District; that the claim he sues on here is an assigned claim and that the assignor thereof is a non-resident of the City of New York and does not reside in said First District of said Court.

Ninth. Said defendants demand a bill of particulars of the alleged cause of action set out in the amended complaint.

Wherefore said defendants and each of them demand that the place of trial of said action be changed from the said First District to the Seventh District of the Municipal Court, Borough of Manhattan, City of New York; that they have a jury trial as herein before demanded; that the bill of particulars demanded be served and that said amended complaint be dismissed with costs.

Florence J. Sullivan, Attorney for Defendants. Office and P. O. address: 27 Cedar Street, Borough of Manhattan, City of New York.

[fol. 39] STATE OF NEW YORK,
County of New York, ss:

Herbert Simpson and William A. Rhodes, being duly sworn, depose and say; that they are two of the defendants in the within entitled action; that they have read the foregoing answer and know the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters they believe it to be true.

Herbert Simpson, William A. Rhodes.

Sworn to before me this 27th day of May, 192[illegible]
Cornelius Bregoff, Notary Public, Residing in Richmond Co. Cert. filed N. Y. Co. Cl'k's No. 202. Cert. filed N. Y. Reg. No. 8176. Comm. expires March, 1928.

[fol. 40] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

WILLIAM STEVENS, Libellant,
against
S. S. "WHITE CITY", Her Engines, etc., Claimant

Statement of Evidence

Before Hon. John M. Woolsey, U. S. District Judge

New York, May 9, 1929—10:30 a. m.

APPEARANCES OF COUNSEL

Neil P. Cullom, Esq., by James E. Freehill, Esq., for the Libellant.

Florence J. Sullivan, Esq., for the Claimant.

Counsel state their claims.

Mr. Sullivan: I wish to have the stenographer take the opening statements.

OPENING STATEMENTS

Mr. Freehill: The action was brought against the "White City" in rem for negligence towage. It is claimed by the

libellants that on or about October 19, 1925, the "White City" received the yacht, "Drifter," owned by T. C. Frost, for the purpose of towing it to the Port of Newark, and there to make delivery on the Transmarine dock, it being the intention of the owner to have the yacht transported by [fol. 41] a vessel to his home in Texas. She was to be moved from Morris Heights, which is on the Harlem River. It had been arranged prior to October 19, 1925, with Alex Simpson, to have the "White City" there at six a. m. on October nineteenth, in order that the boat would reach the Transmarine dock at the Port of Newark in order to make shipment on the "Suscalanco." The "White City," however, did not arrive at Morris Heights at six a. m., but arrived some time about eleven a. m. approximately. The "White City," after reaching Morris Heights, took the yacht "Drifter" in tow, and behind the "Drifter" there was a cradle in which the yacht was to be cradled on board the vessel. In charge of the "White City" were the owners of that boat, Herbert Simpson and William A. Rhodes. Herbert Simpson is the son of Alex Simpson, deceased, with whom the arrangement had originally been made, and William A. Rhodes, also deceased, was a partner or co-owner of the "White City." The "White City" left on October the nineteenth, about eleven a. m., with the yacht "Drifter" in tow, and on the yacht "Drifter" there was a colored man known as Weston, who sort of took care of the lines, and the "White City," after leaving Morris Heights, went down the Harlem River and did not reach Port Newark that night, but about three o'clock, as the respondents claim, they saw the "Suscalanco," which was leaving port, and when they felt that they could not make that vessel, they proceeded to Fisher's Dock, New Jersey, and tied up for the night. At that time, Mr. Rhodes, who was in charge of the "White City," told Mr. Weston that he could go home. They tied up at Fisher's Dock, which is just this side of the Port of Newark. They tied up at [fol. 42] Fisher's Dock, instead of proceeding to the place where the dock could have been taken; and how it was taken care of during the night we do not know except that it has been testified before, that Mr. Rhodes and Mr. Simpson slept on the "White City" and left nobody in charge of the yacht, "Drifter." They said they tied it up to a dock, but nobody was there to watch it during the

night, and the next morning the yacht, "Drifter," was taken in tow from Fisher's Dock by the "White City" to the Port of Newark, New Jersey, on the Transmarine dock, where it was to be taken aboard the vessel to be carried to the home of the owner. This yacht we will show was delivered in good condition to the "White City" at Port Morris on October the nineteenth in the morning and it was delivered on the Transmarine dock with a hole in the bow, and seriously damaged to the extent of some $800.

We shall show by a witness that he was there on the dock at the time the "White City" towed the "Drifter" there. A witness we shall produce saw the yacht, "Drifter" in tow, and noticed immediately that there was damage to the "Drifter." That was the second day, October twentieth. Immediately this matter was called to the attention of Mr. Rhodes and Mr. Herbert Simpson, and a receipt was given to the owners of the "White City," stating that the yacht "Drifter" had been damaged, and the claim was presented to the "White City," and that is in substance the nature of this action.

Mr. Sullivan: May it please the Court. With your Honor's permission I will refer to the matter of the plea of res judicata. This matter of difference first came to the attention of Alexander Simpson. He has a place on the [fol. 43] Hudson River, where he operates boats for public excursions. He does not operate tow-boats, he does not do a tow-boat business, but only pleasure boats. So that your Honor may get the matter right at the start, this is the beginning of the relations which existed.

On October the thirteenth, 1924, the Consolidated Shipbuilding Corporation, Morris Heights, wrote to Mr. Alexander Simpson, who is not concerned in this litigation, asking him: "Confirming our telephone conversation of this date and agreement, please have your work boat, Hughes, here at our works on Monday morning, the nineteenth, at six a. m., to tow a forty-five foot launch on a cradle to Morris Heights to the Transmarine Steamship Company, alongside the steamer, "Suscalanco," at Port Newark, New Jersey. See Captain Hughes on arrival at the pier. It is important that this boat arrive at the steamer before three p. m. that day."

The fact is, that the Mr. Simpson addressed in that letter was unable to do the work, and his son and son-in-law, who

owned a pleasure boat called the "White City," undertook to do the work. I will take my friend's statement as far as the information for your Honor is concerned, without conceding that it is correct in detail. He made his opening about taking the boat down to Port Newark. There are some omissions in it and some items that are incorrect, but on the whole it conveys the idea to your Honor.

Some considerable time after this boat was delivered down there, the insurance company wrote Alexander Simpson claiming certain damage in the amount of $800 odd, and that arose from the payment by the insurance company to [fol. 44] the Consolidated Shipbuilding Corporation, the damages for this accident. Mr. Simpson had no responsibility for it and paid no attention to it. Subsequently this Mr. Stevens, who is before the court now as libellant, started an action as assignee of a claim of the owner of the "Drifter." The owner of the "Drifter" resided in Trenton, and the claim was assigned to Mr. Stevens, who was connected with the insurance company, he bringing action.

Mr. Freehill: Mr. Stevens is the assignee of the owner of the "Drifter."

Mr. Sullivan: No. The proof will show that Mr. Stevens was connected with the insurance company, and it was Mr. Stevens who wrote the letter for the insurance company.

Mr. Freehill: He was just the assignee.

Mr. Sullivan: He was the plaintiff in the Municipal Court case. He came into the Municipal Court action as assignee of the man who was having the "Drifter" built. She was built by this Shipbuilding Company on the Harlem River. He was not the owner. In the Municipal Court case he was the assignee of the man from Texas who was having the boat built. He was the man who was having this "Drifter" built. The evidence will show that the "Drifter" never passed out of the possession of the Shipbuilding Company.

The owners of the "White City," Herbert Simpson, son of Alexander Simpson, and William A. Rhodes, now dead —they owned the "White City"—say that when Mr. Simpson, Sr. could not do the work, they gave the work to these two boys, who did the work for the "White City," and the original engagement was by the Consolidated Shipbuilding [fol. 45] Corporation. They had the "White City" come

there and take this boat, and the Shipbuilding Corporation put their own captain in charge of the convoy, that is, he was in the boat, the "Drifter." He is a negro. He was an employee many years. He was a man of some distinction on the water, although he was colored, and he was employed by the Consolidated Company, and he was placed in possession of the "Drifter" and the cradle. The cradle was floating alongside of the "Drifter." The "White City" started the conveying, after it was fixed and adjusted by the Consolidated Shipbuilding Company. The attachments were like this: From the "White City" the Consolidated Company employees extended a rope of forty feet, and that, was connected and tied to a little light affair called the "Drifter." Forty feet behind that was the "Drifter." The cradle and the "Drifter" were not together. The "Drifter" was forty feet behind the "White City" and the cradle about forty feet behind the "Drifter," tandem.

The Court: Mr. Stevens was the party, as assignee, of the same man suing in the Municipal Court?

Mr. Freehill: It was an action on contract there, not for negligent towage.

Mr. Sullivan: No, it was negligence. I have the charge of Judge Davies right here, and I have their complaint. There is no shift on that. They are the identical parties, and it is the same subject matter.

Mr. Freehill: This is a different type of action.

Mr. Sullivan: Whether they concede it or not, I have the record to prove that it was the same party, the same assign-
[fol. 46] ment, the same transaction.

The Court: Have you any way of proving your record?

Mr. Sullivan: Yes. I have a certified copy, dismissing it against the men who are now before your Honor.

With respect to the res judicata, will your Honor pass upon that now, or later on?

The Court: I do not think I can pass on that now. I would rather have that dealt with first, if the res judicata is conclusive. I suppose you pleaded it.

Mr. Freehill: He must prove that the issues are identical with those here, and that the parties are identical.

The Court: Of course the subject matter must be the same.

Mr. Freehill: We established that the contract was made with Alex Simpson, the father. He did not own the "White

City." We joined the two owners of the "White City," as there was doubt about which of the parties was liable on the contract of towage. The court held that the contract was made with Alex Simpson, and that he had hired these two boys as his agents, and that Alex Simpson was responsible on the contract, but on that action we could not hold them for negligent towage, because we were suing on the agreement.

The Court: Mr. Sullivan has pleaded res judicata. He must establish it to defeat your action. Now, what has he got that is proper evidence in the United States court to establish the fact of this Municipal Court proceeding?

Mr. Sullivan: I have all the pleadings.

[fol. 47] Mr. Freehill: Take the copy of the complaint. I concede that these papers are the file papers in the Municipal Court. They show the entire subject matter and the persons connected with it, and establish the identity of the subject matter and those parties in this action.

The Court: Do you agree that these can be put in without further proof?

Mr. Freehill: All he wants to put in, as I understand it, is the supplemental complaint in the Municipal Court action, Stevens against the three defendants, and the dismissal as to them in the record which he has. I think the only way to do, is to compare the allegations of the complaint in the Municipal Court case with the allegations here.

Mr. Sullivan: Are there some evident things which we can agree on?

The Court: The first issue to be determined here, it seems to me, is the question of res judicata, because, if that is a good defense, that will end the case without going through all this evidence. Now that case I understand is a case in the Municipal Court for the City of New York, Borough of Manhattan, First District. Have you got what would correspond to the judgment roll in that case?

Mr. Sullivan: Yes, sir.

The Court: Why do you not put that in? Are you going to put the record in? I want to emphasize the fact that I believe in cases being tried like English cases, and it is going to meet with great displeasure on my part if anybody is going to be technical where technicalities are not necessary. Is that the record in the case?

Mr. Sullivan: Here is the testimony.

[fol. 48] Mr. Freehill: Will counsel concede that this is the judgment roll? There is an officer here from the Municipal Court.

The Clerk: He was here, your Honor, but he has gone.

Mr. Freehill: This does not contain the plaintiff's case or the ruling of the court to dismiss on the close of the plaintiff's case. This contains the testimony of your witnesses, but not of the plaintiff's witnesses, or the rulings of the court on the motion to dismiss at the close of the plaintiff's case.

Mr. Sullivan: It is a complete record.

The Court: Where is your man from the Municipal Court?

Mr. Sullivan: He came here and I assumed that he would stay here.

The Court: He has left the papers here; I do not see how he could have left without taking the papers with him.

Mr. Freehill: My witness' testimony is not in here.

Mr. Sullivan: It is all there.

Mr. Freehill: I concede that this is a true copy, but I do not offer it in evidence because I do not consider it relevant to this inquiry. I object, because I say that the issues are not identical I do not object because it is a copy.

Mr. Sullivan: I offer it in evidence.

The Court: The Clerk will mark it in evidence.

The plaintiff's amended complaint in the Municipal Court case annexed to the claimant's answer, is marked Claimant's Exhibit A on the res judicata plea.

The answer of the defendants in the same Municipal Court case is marked in evidence Claimant's Exhibit B on the res judicata issue.

[fol. 49] They are received over the objection of the libellant on the ground that they are incompetent, irrelevant and immaterial, but not on the ground that they are copies.

Mr. Sullivan: They have no such thing as a judgment roll up there, but this is the file.

The Court: It says that the jury disagreed.

Mr. Sullivan: Yes, sir, they disagreed.

Certified copy of the verdict or final disposition by the Municipal Court for the Seventh District, Borough of

Manhattan, which case was started in the First District, is marked in evidence Claimant's Exhibit C.

Mr. Sullivan: May I ask your Honor not only to consider that these two defendants have been in court in the action initiated by Mr. Stevens, but that paper will show that the action is still pending. As to Alexander Simpson, that action has not been finally disposed of, but only as to the owners of the "White City."

The Court: These are the court papers. Is there anything else that ought to go in on your plea of res judicata?

Mr. Sullivan: When the action was first started I submitted to my opponent the bill of sale of the "White City," so that they might be fully advised. They asked to examine the defendant Simpson. He was then the only defendant in the action. Herbert Simpson and William A. Rhodes were brought in afterwards, and these are the bills of sale, showing the ownership of the "White City." I feel that it is advisable to offer them in evidence at this time. They had early notice of that, so that they knew what the facts were. I ask Mr. Freehill to concede that they were the owners prior to October 19, 1925, Herbert [fol. 50] Simpson and William A. Rhodes, and that they became the owners on the sixth day of September, 1921.

Mr. Freehill: I will make that concession, with the stipulation, however, that they were the owners on October the Nineteenth, 1925; that is, the defendants Herbert Simpson and William A. Rhodes.

The Court: They state that in the answer.

Mr. Freehill: Yes, sir. It is conceded.

The Court: Is there anything further on the plea of res judicata?

Mr. Freehill: I state that Frost was the owner, and that Stevens was his assignee in the action in the Municipal Court.

Mr. Sullivan: And that he is the same assignee here?

Mr. Freehill: Yes.

Mr. Sullivan: And the same subject matter?

Mr. Freehill: No.

The Court: Is there anything else in this Municipal Court case that you want to put in, in order to deal with this question of res judicata?

Mr. Sullivan: Yes, sir. I believe I have a copy of the assignment.

The Court: He has already conceded that he was the assignee of Frost, as he is in this action.

Mr. Sullivan: Yes, your Honor, but he wants to differentiate on legal conclusions. I want to get the subject matter before your Honor.

Will you please let me have your assignment, Mr. Freehill?

Mr. Freehill: Yes, here it is.

Mr. Sullivan: I now offer in evidence a paper purporting to be an assignment of T. C. Frost, of San Antonio, [fol. 51] Texas, owner of the motor boat, "Drifter," to William Stevens, of Brooklyn.

Mr. Freehill: I have no objection to that going in.

The Court: Is this the same assignment that is the background of the present case?

Mr. Freehill: It is, your Honor. It is the only assignment that was given.

Assignment offered in evidence. Received and marked Claimant's Exhibit D.

Mr. Sullivan: I have what purports to be the stenographer's minutes of the trial in the action of William Stevens, the plaintiff, against Alexander Simpson, Herbert Simpson and William A. Rhodes, the action in the Municipal Court, City of New York, Borough of Manhattan, Seventh District. I cannot say to your Honor in this connection that this transcript is correct. I have not personally compared it.

The Court: Can you agree to it?

Mr. Freehill: It is not a complete record. It is only the testimony of his witnesses.

Mr. Sullivan: May I ask if you have the record of your side?

Mr. Freehill: I have only the testimony of the defendant' three witnesses. I did not order the plaintiff's testimony.

Mr. Sullivan: That was simply that he was the assignee.

The Court: You must have the proofs here.

Mr. Sullivan: I supposed that these minutes were complete.

The Court: It is a good plan to get a concession on anything of that sort. I think that one ought to be candid in

[fol. 52] such things and that the lawyers ought to meet each other and have everything on the table, and then the judge can work it out. I disapprove of all this reservation. I should think that if you had the testimony of some of the witnesses, and he had the other witnesses, that we could piece it together.

Mr. Freehill: I have the testimony of the defendant's witnesses.

Mr. Sullivan: You said you had all the testimony of the witnesses except the plaintiff. I assumed that I had all the minutes. I can bring the stenographer down here and have him testify.

The Court: Suppose we take the testimony and have the stenographer here at two o'clock? We will leave this plea of res judicata, which unfortunately seems not to have been fully proved, until after the rest of the case goes in, and then you can go ahead with your witnesses and see what happens.

William A. Roos, Jr., a witness called on behalf of the libellant, being duly sworn, testified as follows:

Direct examination.

By Mr. Freehill:

Q. Where do you live?

A. 109 West 225th Street, New York City.

Q. What is your business, Mr. Roos?

A. Salesman for the Consolidated Shipbuilding Corporation.

Q. In October, 1925, by whom were you employed?

A. The Consolidated Shipbuilding Corporation.

[fol. 53] Q. What were your duties at that time?

A. Sales department and general traffic work.

Q. Prior to October 19, 1925, did you enter into any arrangement with Alexander Simpson with respect to the towage of the yacht, "Drifter"?

A. I did.

Mr. Sullivan: I object to that. Simpson is not here. He is not a party to this action.

Mr. Freehill: Are you referring to Section 347?

Mr. Sullivan: Oh, no.

The Court: There is no jury here.

Mr. Sullivan: I withdraw the objection.

Q. As a result of that arrangement, did you send this letter?

A. Yes, that is a copy of our letter.

Mr. Freehill: I offer the letter in evidence.

Mr. Sullivan: No objection.

Mr. Freehill: It is on the letterhead of the Consolidated Shipbuilding Corporation, and is dated October 13, 1925. It is addressed to Alexander Simpson.

"Confirming our telephone conversation of this day and agreement, please have your work boat, Hilda, here at our works on Monday morning, the nineteenth, at six a. m., to tow a forty-five foot launch on cradle from Morris Heights to the Transmarine Steamship Company alongside of steamer 'Suscalanco,' at Port Newark, New Jersey. See Captain Lewis on arrival at pier. It is important [fol. 54] that this boat arrive at the steamer before three p. m. that day.

Yours very truly, Consolidated Shipbuilding Corp'n,
W. A. Roos, Jr., Sales Department."

Q. After sending that letter, did you have a telephone conversation with Mr. Simspon?

A. Yes. He called up, as I recall it.

Q. What did you say to him, and what did he say to you?

A. We had a talk about the contents of this letter.

Mr. Sullivan: I do not know whether I should object to this testimony or not. Simpson is dead. I think it is sufficient for me to note on the record that I have considered the subject matter and have concluded not to object.

Q. Will you state that conversation, what he said to you, and what you said to him?

A. It is very hard for me to state that in the exact words.

Q. Give it to the best of your recollection.

A. The general trend of the conversation, as I recall it, to the best of my recollection, is that we talked about this job, that it was very important to get there at six in the morning to tow that boat to the steamer.

Q. Was anything said about the "Hilda" at that time?

A. I would have to have a pretty good memory to tell you that.

[fol. 55] Q. You do not recall?

A. The conversation, as to what was said, it is very hard to recall that.

Q. Was anything said about the "White City" at that time?

Mr. Sullivan: I do object to leading the witness so much.

A. I can't remember that.

The Court: They made the arrangements with the "White City" later?

Witness: Yes. There was a conversation in which he said that he could not get the "Hilda" there, but he would send the "White City."

Mr. Sullivan: I will have to object to that. The testimony seems to be different from what it was before. I object to the conversation with Alexander Simpson, as irrelevant.

The Court: On the ground that he is now dead?

Mr. Sullivan: Well, I hesitate on that.

The Court: Is there nobody that can deal with this agreement with the "White City"?

Mr. Sullivan: Well, I will withdraw the objection.

Q. Will you give it?

A. They said that they could not send the "Hilda," but would send another boat. I said, "Well, if the boat is big enough," and he gave me the dimensions, and I said, "That's agreeable to me," something like that.

Q. Did he mention the name of the boat he was going to send?

A. Yes; the "White City."

[fol. 56] Q. Were you present on October 19, 1925, at which time the yacht, "Drifter," was towed by the "White City"?

A. I was not on the dock when she left.

Q. Did you receive the bill?

A. I did, and I O. K.'d it.

Mr. Freehill: I will ask to have it marked in evidence.

Received and marked Libellant's Exhibit 2.

Mr. Freehill: Is it conceded that the bill was paid?

Mr. Sullivan: We concede that Herbert Simpson and William A. Rhodes, owner of the "White City," received the seventy-five dollars referred to in Libellant's Exhibit 2.

Q. Did you subsequent to October, 1925, see the yacht, "Drifter," Mr. Roos?

A. Yes; I saw her.

Q. Where?

A. On the float, I believe, before she went away.

Q. Before she went away?

A. Yes.

Q. What day was that?

A. I don't know. Probably a day or so before she went away. I saw her lying there with other boats. I don't remember the exact date. I did not see her on the day she left.

Q. Did you see her on the day she left?

A. No, I did not see her then.

Q. After October 19, 1925, did you see the yacht, "Drifter"?

A. When she was back at the shop, yes.

Q. Where?

A. Hauled out on the ways.

Q. Did you examine her?

A. I did not.

[fol. 57] Q. Did you observe anything with respect to her condition?

A. Yes, that she was being replanked.

Q. Describe what you saw.

A. I saw the plank torn off the side. I didn't pay particular attention, because it did not come under my jurisdiction.

Mr. Sullivan: I object to the testimony as irrelevant.

The Court: We had better see what he is leading up to.

Q. Now, subsequent to October 19, 1925, did you have a conversation with William A. Rhodes, one of the owners of the "White City"?

A. Not other than to ask him for a statement of the damage to the boat, and how it occurred, which statement he dictated to my stenographer.

Q. I show you a paper and ask you to state if that is the statement to which you refer?

A. Yes, that is it.

Q. Whose signature is signed there?

A. W. A. Rhodes.

Q. Did you see him sign that?

A. Yes, sir; he dictated it in my office.

Mr. Freehill: I ask to have it marked for identification.

The Court: This is signed by the captain of the tow boat "White City." An admission by the captain is always binding on the vessel.

Received and marked Libellant's Exhibit 3 for identification.

[fol. 58] Cross-examination.

By Mr. Sullivan:

Q. Were you there at the shipyard on the morning of October 19, 1925?

A. I was.

Q. And did you see them arrange to tow this boat?

A. I did not.

Q. Did you see anything that was done in that connection?

A. I did not.

Q. Did you see anything that was done, whether it was in the morning or any other time, with respect to shipping this "Drifter"?

A. No, only the preparation in the shop by the shipping department.

Q. What date?

A. About two or three days before.

Q. And that is all you knew?

A. That is all I observed; it was in their hands.

Q. Do you remember making an affidavit when the application was made to bring in the Shipbuilding Company in the action in the Municipal Court?

A. No, I don't recall that: I may have made such an affidavit.

Q. Do you recall in that connection testifying that the Shipbuilding Company placed a man on the boat,

"Drifter", who was to make that trip on October nineteenth?

A. The usual custom is to place a laborer on the boat.

Q. No; do you recall that?

A. Yes. The company did place a man on that boat.

Q. What company?

A. The Shipbuilding Company.

Q. Give his name?

A. Fred Weston we placed on that boat. He was one of our laborers at that time.

Q. Why was he placed there?

A. Because it is the usual custom to have a man go [fol. 59] alongside of the steamer to take a line on the dock, to see that the boat is fended off on the dock.

Q. And to take care of the boat while it is being conveyed?

A. No, he has nothing to do with that.

Q. Do you recall swearing in your affidavit that he was put on there to take care of the "Drifter", to take care of the lines?

The Court: Show him the affidavit if you want to challenge that.

Q. Do you recall it?

The Court: Show him the affidavit. Read from the affidavit and ask if he said that. If he says that he did not, you have the affidavit itself.

Q. I show you a paper and ask you to examine it.

A. There was such a paper, and this looks familiar to me, presented to me at one time, which I have read. If you show me my signature I can say better.

Mr. Freehill: I will concede that that is a copy.

The Witness: It looks familiar to me.

Q. Did you sign this affidavit? Did you swear to it?

A. I signed an affidavit in reference to what I had to do with it. That looks familiar, but I cannot state definitely now that I did sign that.

Q. Will you testify that you did not swear to it?

A. No, I won't testify to that, because, as I say, I am not certain.

[fol. 60] Mr. Freehill: You may use my copy if you wish.

Mr. Sullivan: Very well, I will use that.

Q. Did you swear to this statement: "Deponent had conferred with the officers of the Consolidated and made full investigations and emphatically denies that he ever employed the defendants, Herbert Simpson and William A. Rhodes, on or about October 5, 1925, to convey to the shipyards of the Consolidated Shipbuilding Company, Morris Heights, New York, to Port Newark",—did you swear to that at any time?

A. I can't recall.

The Court: What is the point of that? That there was no contract with these people? I observe that in the Municipal Court case they were joined as additional parties under that familiar provision of the Code, in order that it might be determined who, if anyone, was liable for this. It is almost the same words as the libel. They were finally dismissed. It was dismissed as against them and the jury disagreed, and it was apparently retained against Alexander Simpson. He has since died. I want to know whether you did make some sort of arrangement. Why are you asking this question?

Mr. Sullivan: They take a dual position. However, I think that the subject matter is quite fully before your Honor.

Q. Did you swear at any time as follows: Deponent on information and belief states that he placed a helper on the "Drifter" as was customary to watch the boat and [fol. 61] attend the lines; that said helper had no control whatever over the tow-boat of defendants, who were to make delivery of the motor-boat, "Drifter"?

A. Yes.

Q. You swore to that?

A. Yes.

Q. I state that that purports to be in your affidavit that I have submitted to you.

A. If I see the original copy I can verify my signature.

Q. Will you tell the court just what you mean, in language other than marine language, where you speak of, "customary to watch the boat and attend the lines?

A. That means that the man who goes on the boat is

to put out fenders and if any of the lines break, to take a line and to stay with the boat when it gets alongside of the steamer until the steamship company takes it.

Q. He was placed on the "Drifter"?

A. He was placed on the "Drifter", yes sir.

Q. And that is the boat that it is claimed was damaged?

A. Yes, sir.

Q. Was he then on the pay roll of the Shipbuilding Corporation?

A. He was.

Q. How long had he worked for your company?

A. About five months.

Q. Was that his line of business?

A. He was a general handy man around the dock.

Q. And his employment included this kind of work?

A. Yes, sir.

Q. What is your position?

A. Salesman.

Q. You see to it that each man is competent to do the work that he is employed for?

A. I have nothing to do with that. That is not in the sales department.

Q. Do you say that this man was competent or incompetent to do that work?

[fol. 62] A. He was competent. He was a boatman, a laborer around the dock. Any laborer around the dock is an old sailor or something of that kind.

Q. How long had he been a boatman?

A. He worked for Tom Turner. He had been captain on boats and engineer. I had known him for many years before this.

Q. And you say he was competent to take care of this boat and do everything with reference to the "Drifter"?

A. As to his duties, yes sir. He was competent to perform his duties.

Q. He was put there to see that the boat was not damaged?

Mr. Freehill: I object to that.

Objection sustained.

Q. Was he in charge of the "Drifter"?

A. Yes, sir.

Q. He was put on there to stay how long?

A. Until the boat arrived at the steamer and the steamship company took hold of it and took him aboard.

Q. Do you know, as a matter of fact, that he left the "Drifter" before the "Drifter" was put aboard the ship?

A. Nothing other than I heard in the testimony.

Mr. Freehill: I object to that as hearsay.

Objection sustained.

Q. Did you speak to Weston afterwards?

Mr. Freehill: I object to that as not binding on the libellant here or its predecessor in interest, Mr. Frost.

Objection sustained.

[fol. 63] Q. Was this "Drifter" insured?

The Court: It is wholly improper to bring that up here.

Mr. Sullivan: The only reason that would justify my bringing this up was to show that this man Frost suffered no damage, not because of any other reason.

The Court: An insurer has a right to be subrogated in place of the insured.

Q. When was the "Drifter" delivered to Mr. Frost?

A. I did not have anything to do with the delivery.

Mr. Freehill: I object to that question.

Objection overruled.

Q. When was the "Drifter" delivered to Mr. Frost?

A. I do not remember the date of the contract.

Q. I asked you the date of delivery.

A. I don't recall the date of delivery.

Q. Was it before or after this October nineteenth?

A. It was after that.

The Court: And was it not at Mr. Frost's risk for this period of the towage of the boat?

The Witness: I do not recall the terms of the contract.

The Court: When a shipbuilder builds a vessel for somebody, there comes a point of time when that vessel is turned over from the shipbuilder to the person for whom it is being built, and at a certain point of time when the [fol. 64] risk, ownership and everything of that vessel is

transferred from the builder to the person for whom it is built. Now, what was that point of time in regard to the "Drifter"?

The Witness: If I remember correctly, it was alongside of the steamer.

The Court: Then you remember that Frost did not own it at this period.

The Witness: As I recall it, he instructed us to deliver it to the steamer and pay for it on delivery of the steamer.

The Court: Then the boat was at your dock?

The Witness: Yes, sir.

The Court: And he paid for it, or did something that satisfied you?

The Witness: Yes, sir.

The Court: And then he ordered you to deliver it to the steamer by which it was to be carried to his place in Texas?

The Witness: Yes, sir.

The Court: Is that the correct situation?

The Witness: Yes, sir.

The Court: Then it was at his risk and his insurance and everything was his after it left your dock?

The Witness: That is as I recall it, yes, sir.

Q. Whose name was the insurance in?

Mr. Sullivan: The question of insurance has come up. We contend that there was no delivery at all, no delivery such as my friend would have your Honor understand. He [fol. 65] wants your Honor to understand that there was at least a technical delivery.

The Court: That is the most natural and sensible practise imaginable. The builder is paid, or satisfactory credits arranged, so that he lets go of his liens of possessions, and the people he is building for say, "We want you to deliver it at a certain place; you take her over there." The shipbuilder is acting as the agent for the person for whom it is being built. This witness has given us what he claims was the fact.

Mr. Sullivan: My understanding is that there was no delivery until the boat reached Texas.

The Court: What you want to do is to claim that neither Frost nor his assignee is a proper party plaintiff because

he had nothing to do with it, and the repairs, if any, were made by the shipyard at its own expense.

Mr. Sullivan: Yes, sir.

The Court: Is that raised in your answer?

Mr. Sullivan: Yes, sir.

The Court: Show me that in the answer.

Mr. Freehill: I have a deposition of Mr. Frost stating that he was the owner.

Mr. Sullivan: We deny that the plaintiff was the real party in interest. I drew the pleading and I know it is there.

The Court: Has the plaintiff been examined by a deposition at the taking of which you were present?

Mr. Sullivan: I believe so, yes.

[fol. 66] The Court: Then that will come up later on.

Q. What boat was the "Drifter" to go on to Texas, Mr. Roos?

A. As far as the shipping department advised me, the boat is in that letter, the "Suscalanca."

Q. Did it go on that boat?

A. I don't know.

Q. You were not at Port Newark at that time?

A. No.

Q. Who is Captain Lewis?

A. I believe he is the superintendent of the steamship company.

Q. You made no investigation over there at all?

A. It was out of my jurisdiction.

Redirect examination.

By Mr. Freehill:

Q. In this affidavit which Mr. Sullivan questioned you about, did you make this statement: "Deponent did, however, engage said defendants as independent contractors to perform certain towage services as is evidenced by the agreement, Exhibit A"?

A. If that is an abstract of the original one I signed.

Recross-examination.

By Mr. Sullivan:

Q. Who was this Weston?

A. I have answered that.

Q. He was an employee of the Shipbuilding Company?
A. Yes, sir.
Q. He was put on board by the Shipbuilding Company?
A. The "Drifter."
Q. For the purposes you have stated?
A. Yes, sir.
Q. And he was not an employee of the "White City" boat?
A. He was employed by the Consolidated. He was em-
[fol. 67] ployed by the shipyard to go on board the "Drifter," to take the lines.

The Court: Sometimes the tows do damage of some sort. The object of putting him on is for safety, of course.
Mr. Sullivan: My contention is that the Shipbuilding Company was in possession of that boat, the "Drifter," on the tow.
The Court: Well, you may contend that, but so far, I do not think the evidence shows it.

Q. You say that he was in the "Drifter" when it left the shipyard in the Harlem River, to remain there?
A. I have testified to that.

Mr. Freehill: I object. He has already testified to that.

Objection sustained.

Mr. Sullivan: In my judgment, his testimony is contradictory.
The Court: I do not think so.

Witness excused.

DENNIS CROWLEY, a witness called on behalf of the libellant, being duly sworn, testified as follows:

Direct examination.

By Mr. Freehill:

Q. What is your address?
A. 400 West 19th Street.
Q. What was your business in October, 1919?
A. Superintendent stevedore at the Transmarine dock.
[fol. 68] Q. Where is that?

A. Port Newark.

Q. Were you on the dock on the morning of October 20, 1925, when the "Drifter" came alongside the dock?

A. Yes, sir.

Q. Who was there?

A. Just Captain Dowell and myself.

Q. What time of the morning was that, approximately?

A. About seven o'clock.

Q. Did you see Mr. Bauer there?

A. Yes, I think that gentleman was on the pier the evening before, waiting for the "Drifter."

Q. And he was there on the morning of October twentieth?

A. Yes, I think he was there.

Q. Will you state what you observed with respect to the "Drifter" on the morning of October twentieth at the Port Newark dock?

A. Yes. There was a hole in the side and we wouldn't take her in.

Q. Anything else that you saw?

A. Well, it looked along the gully of the boat, the side.

Q. How big was this hole that you observed in the "Drifter"?

A. That I can't say.

Q. Was that hole in the boat at the time you saw the "Drifter" coming toward the dock?

A. Yes, sir.

Cross-examination.

By Mr. Sullivan:

Q. Did you ever testify in this matter before?

A. No, I did not.

Q. When did you first learn that they wanted you as a witness?

A. I was notified yesterday.

Q. And who spoke to you before that?

A. Why, I was spoken to about this case about two years ago at Port Newark.

Q. Who was it that spoke to you?

A. That I can't recall.

[fol. 69] Q. Did they speak to you in Port Newark?

A. Yes.

Q. What kind of a looking man was it that spoke to you?

A. Oh, he was a young gentleman. I can't say who it was, though.

Q. Is he in court now?

A. Well, that's two years ago. I meet quite a few. I can't remember.

Q. You see a number of men in this room now, do you not? Some of them are young men.

A. That gentleman with the glasses on I think I met before at Port Newark.

Q. Is that the man who spoke to you in regard to the case?

A. No.

Q. Can you describe the man who spoke to you about the case?

A. No, except that he was a young fellow, about twenty-five years old.

Q. Do you see him in the room now?

A. I can't recall.

Q. Why not?

A. Because I can't say that I do or do not see him, but I know that a man came down to Captain Dowell and asked what was wrong with the boat.

Mr. Freehill: It was Mr. Rivkin.

Q. Was it Mr. Rivkin?

A. I can't say.

Q. He was an attorney in the office of Mr. Stevens?

Mr. Freehill: That is right.

Q. Did you make a statement to him?

A. Yes, I made a statement to him.

Q. And you were never subpoenaed before?

A. No.

[fol. 70] Deposition of T. C. Frost read in evidence.

Q. Nobody has spoken to you since about it?

A. No.

Q. How many years ago is that?

A. Two years ago.

Q. Is it two or three or one or what?

The Court: He is a virgin witness as far as this case is concerned.

Q. Did you make any memorandum at that time?
A. No, I did not make any memorandum.
Q. What was your business at that time?
A. Superintendent stevedore.

Mr. Freehill: I want to read from the deposition of T. C. Frost, a witness examined before a Notary Public in Texas:

1. Were you the owner of the motor boat, "Drifter," the vessel involved in this action, on October 17, 18, 19, 20, and 21, 1925?
A. Yes.

The Court: Was there any cross examination?
Mr. Sullivan: Yes, but I do not think it would add anything to read that.
Mr. Freehill: I call for the production of the receipt dated October 20, 1925, by Bauer to William A. Rhodes and Herbert Simpson, the owner of the "White City."
Mr. Sullivan: I have not got it.

[fol. 71] ALBERT BAUER, a witness called on behalf of the libellant, being duly sworn, testified as follows:

Direct examination.

By Mr. Freehill:

Q. What is your address?
A. 160 West 168th Street, New York City.
Q. By whom are you now employed?
A. Ritz Carlton Hotel.
Q. In October, 1925, by whom were you employed?
A. The Consolidated Shipbuilding Company.
Q. What was your duty?
A. In charge of shipping.
Q. The yacht, "Drifter," was built by the Consolidated Shipbuilding Company?
A. It was.

Q. Were you present on the morning of October 19, 1925, when the "White City" took the "Drifter" in tow at Morris dock?

A. No.

Q. Had you seen the yacht, "Drifter," prior to that time?

A. Yes.

Q. Did you examine her?

A. Yes.

Q. What was her condition?

A. Brand new.

Q. A brand new boat?

A. A brand new boat.

Q. Was there any hole in the bow or the side of the vessel?

A. No damage.

The Court: Where was this hole?

The Witness: It was midship, on the starboard side.

The Court: Did you see her after she came back?

The Witness: Sure. I was there when she arrived with the damage.

The Court: At Port Newark?

The Witness: Yes, sir.

[fol. 72] Q. Were you at the dock at Port Newark on the nineteenth of October or the twentieth?

A. I was there both days.

Q. In the evening of the nineteenth?

A. I was there all day of the nineteenth and the morning of the twentieth.

Q. And what were you there for?

A. Waiting to receive the yacht and see it put aboard the ship.

Q. What ship was she going aboard?

A. The Suscalanca, I think. I don't remember now.

Q. Did the "Drifter" arrive there on the night of the nineteenth?

A. No.

Q. When did she arrive there?

A. On the morning of the twentieth, around seven thirty, about that.

Q. Did you see the "White City" with the "Drifter" and the cradle in tow in the morning coming toward the dock?

A. I did.

Q. Will you state what you saw with respect to the yacht, "Drifter," as to her condition, at that time?

A. I saw her coming up the canal and she was astern of the "White City," about thirty-five feet higher, and the cradle was astern of her.

Q. Describe what you saw with respect to the condition of the "Drifter" at the time she was delivered to you?

A. It was a bright, sunny morning. She had a white hull and there was a hole stove in her, amidship, right above waterline. The sun shone right down on her.

Q. How big a hole?

A. When I got to examine her close, I think there was five planks gone in her.

Q. And you observed that as she was coming to the dock?

A. Yes, she was under tow.

Q. Who was in charge of the "White City" at that time?

A. I don't know who was in charge. I don't know that.

[fol. 73] Q. Who was steering her?

A. She carried a crew of three, I think. I don't know which one was steering her.

Q. That is the "White City"?

A. Yes, sir.

Q. Did you give a receipt, a copy of which I hand you herewith, to the operators of the "White City"?

A. Yes, this is it. It is the time, date and everything.

Mr. Sullivan: I object to that. It is a self-serving declaration. We are not bound by any statement he might put on there.

The Court: Mr. Sullivan, when one man transfers the custody of a thing to another man, they exchange a receipt of some kind. It is perfectly right to have a notation like this. It does not prove anything.

Mr. Sullivan: It is a self-serving declaration. He has already testified as to just what happened, and that is secondary in comparison with his own original testimony.

The Court: As a matter of fact, to me, sir, this thing is of much more value than Mr. Bauer's testimony, because here is something that is in his handwriting.

The Witness: This is the original copy. They asked me for a receipt and I examined the boat and gave them that.

The Court: There is nothing more valuable in the trial of a fact than a paper like this. I do not see why you should think that objectionable, but I shall let it in in any case.

Mr. Freehill: I offer it in evidence.

Mr. Sullivan: I object.

Objection overruled.

Exception.

[fol. 74] Receipt for vessel received and marked: Libellant's Exhibit 4.

Q. Now, Mr. Bauer, after giving the receipt to Mr. Rhodes, did you have any conversation with him with respect to the cause of that damage, or how it happened?

A. I asked how it came about. I said, "How did it happen." They said they didn't know anything about it, didn't even know that the damage was done.

Q. But you pointed it out to them at the time?

A. Sure. They said they were in a hurry to get away. They said they had been up all night, and I said, "Let her go."

Q. That was after you gave the receipt?

A. Certainly, absolutely.

Q. Will you examine this bill and state whether your memory is refreshed so that you can testify exactly what you saw as to the damage?

A. I know what the damage is. I can't testify as to this bill. I know the exact damage was done to the boat. What repairs have been made on it, I can't testify to that. I am no shipbuilder, I only know how to handle them.

Q. Did you accompany the boat back to Morris Heights?

A. I did. I steered her across the Bay behind a tugboat.

Q. Was she delivered back to Morris Heights in the same condition as you saw?

A. There was a hole and we put a canvas over her to keep the water out.

Q. And it was delivered in the same condition at Morris Heights as you had observed at Port Newark?

A. Absolutely.

[fol. 75] Cross-examination.

By Mr. Sullivan:

Q. Have you the contract for the construction of that boat between the Shipbuilding Company and Mr. Frost?

A. Have I the contract? I had no contract. I was only employed by the shipbuilding concern to ship that boat.

Q. In what capacity were you employed?

A. Shipping clerk.

Q. Did you ever see the contract with Shipbuilding Company and Frost for the construction of this boat?

A. Absolutely not, no.

Mr. Sullivan: Have you that contract, Mr. Freehill?

Mr. Freehill: No.

Q. When this "White City" was coming up with the "Drifter" in tow, you say your recollection is that there were three persons on the tow?

A. I believe she carried a crew of three.

Q. Who were the three that you then saw?

A. There is only one I see here now.

Q. Who were the other two?

A. I don't know their names, but they were aboard the boat.

Q. What is the name of that gentleman?

A. This is Mr. Simpson's son.

Q. Who were the other two?

A. Strangers to me. I don't know if it was two or three, but I think it was a three crew boat.

Q. Do you know Weston, the colored man?

A. Yes.

Q. Was he on the boat?

A. He was not aboard the boat. There was nobody aboard the "Drifter."

Q. Where were these three you speak of?

A. Well, I think that they were aboard the "White [fol. 76] City."

Q. Were you present when the "Drifter" left Morris Heights, the shipyard?

A. Not that morning.

Q. Do you know that Weston was to go on the "Drifter"? Did you know it?

A. I did not know he was going aboard the "Drifter."

Q. Was it your business to select the man who would go on the "Drifter"?

A. No, sir.

Q. Do you know if anybody did designate Weston to go on the "Drifter"?

A. I don't know who put the man aboard the "Drifter."

Q. You heard Mr. Roos testify here?

A. Yes, but they employed about fifty laborers up there. They could take any one.

Q. Did you have anything to do with the assigning of the employee who was to go on the "Drifter"?

A. Nothing at all, no, sir.

Witness excused.

PATRICK S. JOLLY, a witness called on behalf of the libellant, being duly sworn, testified as follows:

Direct examination.

By. Mr. Freehill:

Q. Have you your report?

A. No.

Q. What is your address?

A. 16 Knox Place, West New Brighton, Staten Island.

Q. What is your business?

A. Marine surveyor.

Q. Were you a marine surveyor in October, 1925?

A. Yes, sir.

Q. How long have you been engaged as a marine surveyor?

A. At that time, about ten years.

[fol. 77] Q. Did you at any time in October, 1925, examine the yacht, "Drifter"?

A. Yes.

Q. On what date, and where?

A. I think it was October twenty-first, 1925.

Q. Do you want to refresh your memory on that?

A. Yes.

Q. Look at this paper?

A. Yes.

Q. Now will you state the date and the place where you examined the "Drifter"?

A. On October 21, 1925, at Morris Heights, the Consolidated Shipbuilding Company's plant.

Q. Now will you tell the court just exactly what you saw with respect to the condition of the "Drifter"?

A. On the starboard side, midship, about the waterline, there was a hole there about eight or ten inches in diameter, and this boat was constructed of double plank, that is, the inner and outer planks all the seams were covered, and she was copper fastened and screw fastened, and this, in order to get the inner planks out and all that, entails a big job.

Q. Will you state what was necessary to be done to put that yacht in seaworthy condition, and to put her in good condition?

A. I think there were four or five broken planks. They had to be taken out from butt to butt.

Q. Will you state the repairs necessary? Give us an itemized statement of the repairs you found necessary.

A. Four broken planks, a flagpole broken and the bow stem was broken. Those had to be renewed. Then there was the hauling and launching. The band on the stem, the brass band that comes down, it is only a little piece of half round brass.

The Court: We do not go into the damages here.

[fol. 78] Mr. Freehill: The damages are so small, I thought perhaps your Honor would take it.

The Court: The first thing to do is to prove that there was some damage, just the nominal damage. The rest of it goes to the commissioner.

Mr. Freehill: Then I will withdraw this witness.

Mr. Sullivan: No questions.

Mr. Freehill: I am withdrawing him as to the question of the damages but not as to what he saw.

Herbert N. Simpson, a witness called on behalf of the libellant, being duly sworn, testified as follows:

Direct examination.

By Mr. Freehill:

Q. What is your full name?

A. Herbert N. Simpson.

Q. You are the son of Alexander Simpson, deceased?

A. Yes, sir.

Q. You were one of the co-owners of the "White City" in October, 1925?

A. Yes, sir.

Q. Were you on the "White City" on the morning of October 19th, 1925? Were you on the "White City" when the "Drifter" was taken from Morris Heights?

A. Yes, sir.

Q. At that time the "Drifter" was in good condition, was she not?

A. As far as I could see. I could not see anything wrong with her. I wasn't close enough to her.

[fol. 79] Mr. Sullivan: No questions.

Mr. Sullivan: May I call him again as my own witness if I wish to?

The Court: Yes.

Mr. Freehill: Libellant rests.

Herbert N. Simpson, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Direct examination.

By Mr. Sullivan:

Q. You are the Herbert Simpson referred to here as part owner of the boat, "White City"?

A. Yes, sir.

Q. When did you become owner?

A. Why, I don't just recall when we bought the boat.

Mr. Freehill: It is conceded that they were owners.

Mr. Sullivan: I would like to show what kind of boat it was by these two certificates. The point I have in mind is, that the description of the boat would show that it is not a tow-boat, that this was a courtesy. I offer these in evidence.

Mr. Freehill: I object to them as incompetent, irrelevant and immaterial, but not that they are copies.

Mr. Sullivan: This was an emergency. They knew it was a pleasure boat, and I think under the decisions it is of some consequence to the boat owner to show the nature of it.

[fol. 80] Q. You and the Mr. William A. Rhodes referred to as half owner of the "White City," was he related to you?

A. Yes, sir.

Q. How?

A. He is my brother-in-law.

Q. What is your business?

A. Excursion business.

Q. How long have you been engaged in that business?

A. Why, for the last seven years, six or seven years.

Q. You stated that you were the son of Alexander Simpson, referred to here?

A. Yes, sir.

Q. How long was he engaged in that business?

A. About thirty years.

Q. Did you always reside with your partner?

A. Yes, sir.

Q. At his boat house?

A. Yes, sir.

Q. Nearby?

A. Yes, sir.

Q. Are you familiar with the waters of the Hudson River, New York Bay and Harlem River?

A. Yes, sir.

Mr. Freehill: I will concede that he is familiar with the waters.

Q. And the tides?

A. Yes, sir.

Q. And currents?

A. Yes, sir.

Q. And waves?

A. Yes, sir.

Q. And what effect waves have upon the water referred to?

A. Yes, sir.

Q. You are actually a boatman handling boats?

A. Yes, sir.

Q. For seven years you have been continuously engaged in handling what kind of boats?

A. Pleasure boats.

Q. The Simpson boat house is one of the old boat houses in the City of New York, confined to pleasure boats?

A. Yes, sir.

[fol. 81] Q. Do you understand the construction of a boat and its operation?

A. Yes, sir.

Q. Boilers, engines, and such as that?

A. Yes, sir.

Q. And everything that relates to the boats that you speak of?

A. Yes, sir.

Q. You repair boats?

A. No, sir.

Q. You have worked upon boats?

A. Yes, sir.

Q. But don't you repair the boats you own?

A. We do some small repairs, but I wouldn't say I am a repair man. I can do some small repairs.

Q. You are not a boat builder?

A. No, sir.

Q. You have a repair yard there, have you not?

A. No, sir.

Q. You have seen boats repaired at your father's place?

A. Yes, sir.

Q. And they brought in mechanics to go around?

A. Yes, sir.

Mr. Freehill: I object, He is not qualified as to this.

The Court: We are not going into the damages now.

Mr. Sullivan: I want to show his competency with respect to operating a boat.

The Court: It is not necessary to know how to repair a boat in order to operate one.

Q. William A. Rhodes; what was his business?

A. He was a captain.

Q. A boat captain?

A. A boat captain, yes, sir.

Q. And he had been about the waters for many years?

A. Yes, sir.

Mr. Freehill: I object to this testimony. He is testifying as to some other witness's knowledge.

[fol. 82] Q. You say he was a boat captain?

A. Yes, sir.

Q. Did he have a license?

A. Yes, sir.

Q. What sort of license?

A. Motor boat license for New York Harbor and vicinity, something like that.

Q. You are the Herbert Simpson referred to here in this proceeding against the "White City"?

A. Yes, sir.

Q. And this Simpson Boat Works is 151st Street on the Hudson River?

A. Yes, sir.

Q. Were you on the boat, the "White City," on the morning of October 19th, 1925?

A. Yes, sir.

Q. Was this the day that you undertook to convey this "Drifter" from Morris Heights over to Port Newark?

A. Yes, sir.

Q. How did you come to undertake that work?

Mr. Freehill: I object. That is immaterial. He testified that he undertook it.

The Court: I suppose he was engaged to do it.

Q. What brought it to your attention first?

A. My brother-in-law. He said, "Father told me about a towing job that Mr. Roos wanted us to do for the Consolidated Shipbuilding Corporation."

Q. Did you know about your father wanting to use his Hilda boat?

A. Yes, sir.

Q. Haven't you heard of it since?

Mr. Freehill: Objected to.

Objection sustained.

Q. Your brother-in-law was the first one who spoke to you about this work?

A. Yes, sir.

Q. What did he say?

A. That Mr. Roos called up.

[fol. 83] Mr. Freehill: I object to what Mr. Roos said to Mr. Simpson, as not binding on our clients.

The Court: These gentlemen were in charge of the "White City" and they took her in tow. That is the point of departure, really. You have an implied bailment of this vessel.

Q. After you talked to your brother-in-law, what did you do?

A. Why, on the morning of October the nineteenth, 1925, we went around to the Consolidated Shipbuilding Corporation at Morris Heights, and we lay out in the stream while they towed out the "Drifter" to the "White City," and we helped the employees of the Consolidated to tie the "Drifter" to the "White City," and they attached the cradle on to the stern of the "Drifter," and we proceeded to take the boat to Port Newark.

Q. About what time did you arrive at the shipyard?

A. Eight-thirty in the morning.

Q. You did not tell me just how you came to go over there. You said your brother-in-law spoke to you. What was said? How did you come to go?

Mr. Freehill: I object on the ground that it is immaterial.

Objection overruled.

A. I went there with the "White City." We went to the Consolidated Shipbuilding Corporation in the Harlem River.

Q. I asked you how you came to go over there, and you have not told me yet.

A. We got word from Mr. Roos.

Mr. Freehill: I object. He is testifying to some conversation between other people.

[fol. 84] Q. Were you in charge of this "White City"?

A. No, sir.

Q. Who was?

A. My brother-in-law.

Q. Were you with him there?

A. Yes, sir.

Q. You say that the "White City" was ordered over to this Consolidated Shipyard Corporation?

A. Yes, sir.

Q. How did you come to know that this Boat Company wanted that?

A. Through my father.

Q. What did he say to him?

A. Well, he said that he got a job. I either learned of it through my father or Mr. William Rhodes that we were to tow a vessel from the Consolidated Shipbuilding Corporation.

Q. And you went over with this "White City"?

A. Yes, sir.

Q. Was there some other boat to be used?

A. Yes, sir, the Lady Hilda II.

Q. Who owned that?

A. My father.

Q. Why wasn't that used to tow this boat, if you know?

Mr. Freehill: I object.

Objection sustained.

Q. You testified you got there at what time in the morning?

A. Eight-thirty.

Q. Who connected with the Shipbuilding Company brought out this "Drifter"?

A. Two men came out and there was one man on the boat.

Q. This was where?

A. At the Consolidated. Two men towed it to where we were laying in midstream with a small motor and there was a colored man, Captain Weston, on the "Drifter."

Q. How was the "Drifter" attached to the "white City"?

[fol. 85] A. She was attached to the "White City", and then they had a cradle that was attached to the stern of the "Drifter".

Q. And did the men from the Shipbuilding Company help to attach these things?

A. Yes, sir, by a rope forty feet long.

Q. How?

A. One end of it attached to the "White City," one end to the "Drifter," and another rope from the "Drifter" to the cradle.

Q. And about what time of the morning did you get started?

A. That was about nine o'clock. It took us probably half an hour before we got started till we got tied up.

Q. Who was on the "White City"?

A. My brother-in-law and myself.

Q. And who was operating the boat? Who was the captain?

A. My brother-in-law.

Q. What did you do?

A. I was a deckhand on the boat, to see that everything was all right, to give them a hand on the "White City."

Q. Who was on the "Drifter"?

A. Captain Weston.

Q. Where did he get on?

A. He was on the boat when the boat was brought out to us.

Q. And he stayed on?

A. Yes, sir.

Q. And then did he attach*ed* the cradle to the "Drifter"?

A. Yes, sir.

Q. How?

A. By a rope about forty feet long.

Q. When you started on the journey, what waters did you go through?

A. We went down the Harlem River to the East River and across the Upper Bay, through Kill van Kull, and to Newark Bay, and then we were there at the Transmarine Corporation.

Q. Do you know the waters called Hell Gate?

A. Yes, sir.

[fol. 86] Q. Where is that located?

A. That is about Ninety-sixth to Ninety-second Street, East River.

Q. Did anything happen to the tow at that point?

A. No, not right there, but just below that.

Q. Will you tell the court the condition of the waters at that point?

A. The condition at Hell Gate,—the water is very rough and very bad, and on account of the cross currents, there's five currents come in at one place, and it's a narrow channel.

Q. What, if anything, happened at that time?

A. Nothing just right there, but it happened below that.

Q. Tell the court what it was.

A. We were in the East River just below Hell Gate, underneath the Queensboro Bridge. Our attention was called that the cradle broke loose on the "Drifter."

The Court: The line broke that was attached by the company?

The Witness: It was to the "Drifter."

Q. Between the "Drifter" and the cradle?

A. Yes, sir.

Mr. Freehill: I object to the leading question.

The Court: Yes, do not lead the witness.

Q. I was asking what happened.

A. That line broke, the line that was attached from the cradle to the "Drifter" broken underneath Fifty-ninth Street Bridge, and Captain Weston called our attention to it, so we immediately turned around and he hooked on to the cradle again and we proceeded on our way.

[fol. 87] Q. Did you have much trouble in getting connected with the cradle after it broke?

A. No, maybe fifteen or twenty minutes, or maybe half an hour before we could attach it again.

The Court: Is the cradle something on the deck of the steamer?

The Witness: Yes, sir, it is an open cradle. It floated.

Q. You say it took fifteen minutes to half an hour to get started again?

A. Yes, sir.

Q. And then what?

A. Then we trundled it down to Fisher's Dock at Bayonne. No, we didn't get there yet, I'm ahead of my story. We came down the Bay and through Kill van Kull and we saw the "Suscalanco," the steamer that was supposed to take this "Drifter" on her deck, we seen her going out, and she was under power.

Q. What time was this?

A. Around five o'clock; maybe it was a little bit earlier. It was around that, in the evening. And so Mr. Rhodes says, "I don't know what to do. We better go in and call up. There's the boat that the "Drifter" is supposed to go on. You'll have to call up and see if they have made any different arrangements, and we called to Weston," and he said, "Yes, pull into a dock and find out." So we went into the dock and he went to call up, and when he came back and he said that the party up there at the Con-

solidated seemed to be a watchman of some kind, and the only thing he could say was to bring the boat back. Then he called up my father-in-law and he said that the boat was to go on another steamer, that the orders were changed. He said that we should take the boat to Port Newark that [fol. 88] next day, or as soon as we could get there. So we come back to the dock and we made the "Drifter" fast alongside of the pier there and made the "White City" fast, and we put fenders over the side and we stayed there over night.

Q. What was done with the "Drifter"?

A. This was at Fisher's Dock, at Bayonne. The "Drifter" was tied alongside of the dock and we put on big round rubber tires, fenders, to fend her off from the dock, so that she wouldn't bang or scratch or hurt herself.

Q. Is this smooth water, or rough, or what?

A. Smooth. It's inside.

Q. You go in some distance to get in there?

A. Yes, sir.

The Court: It is a dock like the Erie Basin, or something like that?

The Witness: Yes, sir.

Q. Where did you stay that night?

A. On the "White City."

Q. How far was the "Drifter" from the "White City"?

A. Maybe about fifteen feet, ten or fifteen feet.

Q. And the cradle was there, too?

A. Yes, sir.

Q. Why didn't you continue on when you saw that boat, that ship, coming out, that the "Drifter" was to go on? Why didn't you continue on to Port Newark on the night of the nineteenth?

Mr. Freehill: I object to the question on the ground that it is incompetent, irrelevant and immaterial.

The Court: I do not think it makes much difference one way or the other.

[fol. 89] Mr. Sullivan: I think it is important. We are trying to show that we did everything in our power.

Mr. Freehill: That does not tend to explain the cause of the damage, why he did not continue on.

The Court: He may answer.

A. Because it was getting darker just then and we thought it would be much better if we got an early start in the morning and took her out in daylight.

Q. Who was it that told you to continue there the next day?

A. My father. He said it was to go on a different boat. They changed the orders.

Q. You got up the next morning at Fisher's Dock at what time?

A. About five in the morning.

Q. And you looked over the boats?

A. Yes, sir.

Q. The "White City" and the "Drifter" and the cradle?

A. Yes, sir.

Q. What condition did you find them in?

A. Perfect condition. I couldn't see anything wrong anywheres.

Q. That was the next morning?

A. That was the next morning, yes, sir.

Q. They were in the same condition as they were when you received them from the shipyard up at Morris Heights?

A. Yes, sir.

Q. And did you inspect them? Did you arrange them in tandem to go to Port Newark?

A. Yes, sir.

Q. Who was with you?

A. There was my brother-in-law and myself.

Q. What had become of Weston?

A. He left the night before. He said he wanted to go home.

[fol. 90] Q. What time did Weston leave the tow?

A. On the nineteenth, the night before, around seven or seven-thirty, after he had the boat tied up alongside of the pier. He said, "I'm not going to stay around here all night."

Q. Have you seen Weston here to-day?

A. No, sir.

Q. He testified in the Municipal Court, did he?

A. Yes, sir.

Q. About how far is Fisher's Dock from Port Newark?

A. It's about five or six miles.

Q. What time did you leave Fisher's Dock in the morning, October 20, 1925?

A. Oh, around half past six, or maybe six.

Q. Was it daylight?

A. It was daylight, yes, sir.

Q. And you proceeded to tow to Port Newark?

A. Yes, sir.

Q. Arriving there about what time?

A. Around seven-thirty or eight in the morning.

Q. Who was at the Port Newark Dock when you arrived?

A. There was a man by the name of Mr. Bauer there.

Q. He was a witness here to-day?

A. Yes, sir.

Q. Who else?

A. There were quite a few others around there, busy on the dock, but I don't know who they were.

Q. Many people and many boats?

A. Yes, sir.

Q. Did you remember him?

A. Yes, sir.

Q. Did you tie up there?

A. Yes, sir. We tied the boat alongside of the dock.

Q. And what did you do then?

A. We gave him a hand to put slings around the boat to get ready to hoist the boat on.

Q. What is a sling?

A. Big boat slings. They go around the hull of the boat, [fol. 91] to lift the boat out of water. We helped fasten them around and we asked Mr. Bauer if there was any place around there where we could get something to eat, and he said, "Yes, you can get something to eat over there," and we went over there to get something to eat, and we were there eating our breakfast when somebody came over and said Mr. Bauer wanted to see us, so we come back and he called my brother-in-law over and told him that there was a hole in the side of the boat. He said, "How did that happen?" We said we didn't know, and we asked them did they lift the boat out of water, and they said, yes, and when they noticed the hole they put her back into the water again, and Mr. Rhodes said to Mr. Bauer, would he give us a receipt for the boat, and he said, yes. So he gave him some kind of a receipt for the boat and we journeyed home.

Q. When you delivered the boat to Port Newark, was it in the same condition as it was when you took it from the shipyard?

A. Yes, as far as I could see.

Q. And you say Mr. Bauer was there when you landed at Port Newark?

A. Yes, sir.

The Court: Did you get a receipt from Mr. Bauer?

The Witness: My brother-in-law did.

The Court: Did you see it?

The Witness: No, sir.

Q. After you landed, or when you were landing at Port Newark, Bauer was there?

A. Yes, sir.

Q. And you have already stated that it was daylight?

A. Yes, sir.

Q. And before you went to breakfast, did Bauer say anything to you or Mr. Rhodes about any hole or damage to the "Drifter"?

A. No, sir.

[fol. 92] Q. The first time you heard anything about damage was when he sent over to the restaurant?

A. Yes, sir.

Q. And that was after they attempted to hoist it to the ocean-going steamer?

A. Yes, sir.

Q. Did Mr. Bauer tell you that they attempted to raise it on to the ocean-going steamer?

A. Yes, sir.

Q. What did he say to you about it?

A. He said, "We lifted it out of the water and we noticed a hole in the boat and we put it back in the water again."

Q. At that time did Mr. Bauer speak to you about any hole or break in the "Drifter"?

A. No, sir.

The Court: Did you bring her alongside of the steamer?

The Witness: No, sir, we brought her alongside of the pier.

The Court: What sort of a crane arrangement for lifting was there?

The Witness: They had a big overhead trolley.

The Court: And they were going to lift her up and put her on the steamer?

The Witness: Yes, sir.

The Court: And you did not actually see them start to do that at all?

The Witness: No, sir.

The Court: And the receipt was not given until after you got back from breakfast?

The Witness: That is right.

The Court: Are you sure about that?

The Witness: Yes, sir.

[fol. 93] Q. You were there when they started to put the slings on?

A. Yes, sir.

Q. And started to raise her?

A. We went to breakfast.

Q. You spoke about putting some tackle on her?

A. Yes, sir.

Q. Was that done before you went?

A. Yes, sir. We helped to do it.

Q. Did you help?

A. Yes, sir.

Q. Who were present when you were doing it?

A. Mr. Bauer and several other men.

The Court: How did you get the slings underneath the bottom of the hull of the "Drifter"?

The Witness: We let the lines sink down and pulled them back.

The Court: How big was the "Drifter"?

The Witness: About forty-five feet.

The Court: Was she a heavy vessel?

The Witness: She was a motor boat.

The Court: Did you have to walk up and down her decks in order to get them under her?

The Witness: Yes, sir.

The Court: Did you have to look over the sides at all while you were doing it?

The Witness: Yes, sir.

The Court: What side was this hole on?

The Witness: The starboard side.

The Court: When did you first notice that?

The Witness: When Mr. Bauer called us back from breakfast.

The Court: Was that starboard side on the side towards the dock or on the side away from the dock?

[fol. 94] The Witness: On the side towards the dock.

The Court: How was this overhead trolley arranged? Did it run along and have a bridge structure, and have a crane that came over the side to the dock?

The Witness: Yes, sir.

Q. How was this boat built, the sides of the "Drifter"?

A. I couldn't say how she was built.

Q. I mean; were they thick or thin, strong or weak or what?

A. About the average size. Probably half an inch thick.

Q. Not made to operate in New York Bay, or that section?

A. You can operate them any place practically, but they're not made for rough usage, or rough water. Of course they can operate anywhere.

Q. What was the condition of the water on that trip from Morris Heights down to Port Newark?

A. It was very rough. It was a windy day and it was rough and it was raining. Conditions on that day were very bad.

Q. Do you know what time it got dark that day?

A. Oh, I should say around five o'clock, probably, maybe around that time.

Q. It was cloudy and raining?

A. Yes, sir.

Q. Waves were high?

A. Yes, sir.

Q. This was when?

A. On the nineteenth of October.

Q. Do you know which way the tide was that day?

A. I could not say now for sure. I know we had the tide with us part of the way and against us part of the way, but which part I couldn't say.

Q. Do you know the effect of the tide being against you, with a float such as that, through the water?

A. Yes, sir.

[fol. 95] Q. What is it?

A. If you tow alongside of any of that stuff that's in the water you're liable to punch a hole in the boat, any submerged objects or driftwood.

Q. Do you know whether or not your father advised the company to ship that boat on the eighteenth or the nineteenth?

Mr. Freehill: I object.

"A." Yes, I know something about it.

Mr. Freehill: Were you present at the time any conversation was had with Mr. Simpson?

Mr. Sullivan: I object.

The Court: None of it is material.

Mr. Sullivan: Except that if the Boat Company committed a rash act, they can't visit the consequence on these people.

The Court: I want you to be prepared to argue this case when the evidence is in. I want you to be ready to deal with the res judicata plea. I think the res judicata plea is quite important.

Mr. Sullivan: I have the testimony of Alexander Simpson.

Mr. Freehill: I object to the testimony of Mr. Rhodes and Mr. Alexander Simpson, deceased witness, who testified in the Municipal Court case.

The Court: We will take that up after recess.

Recess to 2 p. m.

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2 p. m.

[fol. 96] Same appearances.

Witness resumes the stand:

By Mr. Sullivan:

Q. Is your father, Alexander Simpson, living?

A. No, sir.

Q. When did he die?

A. May 13, 1927.

Q. Is William A. Rhodes, co-owner of the "White City," living?

A. No, sir.

Q. When did he die?

A. December 4, 1928.

Q. He was drowned, was he?
A. Yes, sir.
Q. This "White City" boat, what kind of a boat is that?
A. It's a party boat, an excursion boat.
Q. Is it a tug boat?
A. No, sir.
Q. Was it ever used for that?

The Court: You did undertake the towing?
Mr. Sullivan: I have looked up the decisions and in that line of business it is a little different than it is generally.
The Court: It was done for pay, and they were actually paid.

Q. Mr. We[illegible]on, you say, was employed by the Shipbuilding Compa[illegible] and was on the "Drifter" when it came out to the "White City"?
A. Yes, sir.
Q. What did he do in the "Drifter"?
A. He steered the boat.
Q. And in conveying this "Drifter" and the cradle down there, did you watch out?
A. Yes. sir.
[fol. 97] Q. To avoid any trouble?
A. Yes, sir.
Q. To keep watch out on the deck?
A. Yes, sir.
Q. To see that nothing happened?
A. Yes, sir.

Cross-examination.

By Mr. Freehill

Q. Did I hear you testify that Captain Weston operated the "White City"?
A. No, sir.
Q. Your partner, Mr. Rhodes, was the operator of the "White City"?
A. Yes, sir.
Q. You testified respecting the conversation that you had with Mr. Bauer at the time you arrived at Port Newark on October 20th, as follows, did you now? I refer to page 72 of the minutes of the Municipal Court trial:

"Q. Mr. Simpson, when you got to the Transmarine Pier and you were ready to go to breakfast, you said Mr. Bauer said to you, 'Not yet, you have to wait until the boat is received.' Is that right?

A. Yes, sir.

Q. Did he say anything else to you at that time?

A. Not to me, no sir.

Q. Did he say anything else within your hearing?

A. No, sir.

Q. To anybody?

A. No, sir"

Did you so testify?

A. Yes, sir.

Q. Now did you testify in that trial that Mr. Bauer said to you that damage was discovered while the boat was being lifted out of the water? I am referring to the "Drifter"?

A. I think I did.

Q. Are you sure of that?

A. I am pretty sure.

[fol. 98] Mr. Freehill: Is it conceded that he did?

The Court: This is an important matter. Let us get it clear. Do I understand that he admits at the Municipal Court hearing that Mr. Bauer had this interview immediately succeeding the time when they came back and found this vessel damaged, and said to him then that the damage was discovered just as they started to lift her out of the water?

Mr. Freehill: Yes. He testified at this trial and I asked him if he so testified in the Municipal Court action and he said that he did.

The Court: At this trial he said he never heard or saw anything of the damage at all until after they had gone to breakfast, and then Mr. Bauer sent word for them to come back because they had found that this vessel was damaged, and they started to lift her and found this damage and they put her back in the water.

Mr. Freehill: In the Municipal Court action he had not testify that Mr. Bauer said that "We discovered the damage at the time we were lifting the boat out of the water.

Mr. Sullivan: The minutes are here.

Q. Is this a copy of your testimony, pages 68 to 72?
A. Yes, sir.

Mr. Sullivan: I will consent that the minutes go before your Honor so that there will not be any shadow or shading of meaning.

[fol. 99] The Court: We want to point the thing so that this man here, who has said something today, has these things before him and is confronted with the fact that he said something else on another occasion. If he said something different at another time from what he says here, that may be important.

Mr. Sullivan: My friend is not quoting the words right.

Q. Have you found it?
A. No. I don't know if I was asked that or not.
Q. What is your best recollection, that you did testify?
A. I don't know if I did testify to that the last time.
Q. You do not know that you did?
A. I don't know whether I did or not.
Q. On the previous trial, did you testify as to the conversation that you have testified to with Mr. Bauer today, to wit, that on your return from breakfast, Mr. Bauer said to you that he discovered the damage as the "Drifter" was being lifted out of the water?
A. I don't think I did testify to it before, but we had a conversation on that; I don't think I testified to that the last time, I don't think I was asked that question.
Q. Weren't you asked this question (page 72): "When you got to the Transmarine Pier and you were ready to go to breakfast, you said Mr. Bauer said to you, 'Not yet,' you have to wait until the boat is received." Is that right?
A. That is right.

The Court: What does "not yet" mean?
The Witness: That we could not got home until we had delivered the boat.

[fol. 100] Q. And when you made delivery of the boat, didn't you go to breakfast?
A. Yes.
Q. Your partner got this receipt, did he not?
A. I don't know, I was not talking to Mr. Rhodes then.

The Court: This morning he said that that was given to them after they came back from breakfast.

Q. Is that when it was given?

A. I think it was given then, but it was not given to me.

Q. You did not see it passed?

A. No, sir.

Q. And it was not given to you?

A. No, sir.

Q. On the night of October 19th you slept on the "White City"?

A. Yes, sir.

Q. There was nobody on the "Drifter"?

A. No, sir.

Q. What time did you arrive at Fisher's Dock?

A. Somewhere around three to five, around five I think it was.

Q. Haven't you testified that you arrived there at three o'clock?

A. I don't recall the exact hour. It was probably around three and five.

Mr. Freehill: Under his contract he was to take the "Drifter" to Port Newark, and if he went off his course and did not make delivery at the time and place specified in the agreement, that is a breach of contract, deviation.

Mr. Sullivan: Your Honor recalls that when they got to Fisher's pier they saw this boat that they were to load on, coming down, and they were in doubt about the situation and telephoned.

[fol. 101] Q. I read from your answer in this action, "The respondents were to convey said 'Drifter' on the 19th of October, 1925, to said Port Newark"—you read it. Does that refresh your recollection as to the time you arrived at Fisher's Dock?

A. I believe it was between three and five.

Q. It was nearer to 3:30, wasn't it?

A. It might have been.

Q. How long is it from Fisher's dock to the Transmarine Dock, in Port Newark?

A. Say half or three-quarters of an hour.

Q. On October 19, daylight saving time was in effect, was it not?

The Court: No; that ends in September.

Q. You could have proceeded direct to Port Newark to the Transmarine Dock, could you not?

A. The captain seen the "Suscalanco" going out, and that was the boat that he got orders that the "Drifter" was to be loaded on, and when he seen her going out, he called to Captain Weston, I believe, and said, "There goes the steamer that this boat was supposed to go on. I'm at a loss what to do. We'd better go in and tie up and call up about what boat the 'Drifter' is supposed to go on."

Q. Your partner, Mr. Rhodes, had a conversation with Mr. Simpson wherein he was advised to go direct to the Port of Newark. Is that correct?

A. He might have had. I didn't have the conversation with him.

Q. Then you don't know what instructions Mr. Rhodes received?

A. No.

Q. You personally received no instructions other than those originally given?

A. I received no instructions.

[fol. 102] Q. And you were not present at the time any instructions were given?

A. No.

Q. So that your testimony as to what your father, Mr. Simpson, said to Mr. Rhodes, or what any watchman at Port Morris said to Mr. Rhodes, is purely what was told you?

Mr. Sullivan: I object to that.

The Court: It is all perfectly obvious.

Q. On the morning of October 20, what did you do?

A. I was on the "Drifter". I went aboard the "Drifter" to steer her like Captain Weston was doing before.

Q. You were on the "Drifter"?

A. I was on the "Drifter", yes.

Q. Did you do anything else?

A. No, sir.

Q. You went to the "Drifter"?

A. Yes, sir.

Q. And steered her?

A. Yes, sir.

Q. And that is all you did from the time you got up that morning?

A. Yes, sir.

Q. What time did you leave Fisher's dock on the morning of October 20th?

A. I think somewheres around six six-thirty, or maybe seven, between six and seven o'clock.

Q. Between six and seven?

A. I believe it was about that time.

Q. You do not know approximately at what time this damage to the "Drifter" occurred, do you?

A. No, sir.

Q. You did not see it?

A. I did not see it, no, sir.

Q. And you did not spend the night on the "Drifter"?

A. No, sir.

Q. You spent it on the "White City"?

A. Yes, sir.

[fol. 103] Q. And if the "Drifter" had been damaged on the night of the 19th you would not have known it, would you?

Mr. Sullivan: I object.

Objection sustained.

Q. When your attention was directed to the "Drifter" by Mr. Bauer, did you observe a hole on the starboard side of this "Drifter"?

A. Yes, I seen where the planks were pushed in; I wouldn't call it a hole, but they were bent in.

Q. It was one foot square?

A. No, I don't think so.

Q. How big?

A. About six inches, probably.

Q. Was there anything else that you observed?

A. That's all, I believe.

Q. Now, when you got to Port Newark, your attention was directed immediately to the condition of the "Drifter"?

A. No, it was not.

Q. How long after?

A. Well, we got there and tied alongside; we helped put the slings around the boat, and then Mr. Bauer said, "You can go and get something to eat."

Q. Whom did you help?

A. I don't know. Some men down there.

Q. You don't know whom you helped?

A. No. They were all strangers to me. I don't know.

Q. Don't you know that in this line of busines you have nothing to do with tying slings around a yacht that you make delivery of to a steamer?

Mr. Sullivan: I object to that.

Objection sustained.

A. We just give them a hand, that's all.

[fol. 104] Q. And yet you accepted a receipt from Mr. Bauer?

A. No, I did not receive a receipt.

Q. On the morning of October 20, did you personally call up anyone connected with the Consolidated Shipbuilding Co.?

A. No, sir.

Q. You made no request for Mr. Weston?

A. No, sir.

Q. Were you present at the time Mr. Rhodes spoke to Mr. Weston about leaving, that he could go home that night?

A. He wasn't told he could go home, no, sir. He said he was going home.

Q. I call your attention to the testimony of Mr. Rhodes on the last trial, and I ask you if this refreshes your recollection?

The Court: What has become of Mr. Weston?

Mr. Freehill: He has left the employ of the Consolidated and we can't find him.

The Court: We will have to assume that this is the evidence. If you are dealing with evidence he gave himself, that is another matter, but you can't read from another man's testimony.

Mr. Sullivan: The burden is on them to explain Weston's absence.

Mr. Freehill: He is not under our control.

Q. Have you a very clear recollection of the conversation Mr. Weston had with Mr. Rhodes on that occasion?

A. Some of it, yes.

Redirect examination.

By Mr. Sullivan:

Mr. Sullivan: I consent to have the minutes put in so that your Honor may have the entire matter before you.

[fol. 105] The Court: Your opponent says it is not a complete record.

Mr. Sullivan: His record and mine make a complete whole.

The Court: You do not seem to agree on that.

Q. How far do you figure it from Morris Heights to Port Newark, the route you took?

A. I think it is somewhere between twenty-five and thirty miles.

Q. You went the usual route?

A. Yes, sir.

Q. Between Hell Gate and the East River? That was the most direct route?

A. Yes, sir.

Mr. Sullivan: The other two witnesses are dead. That is the only witness I have.

The Court: Do you want to put in the evidence of those dead witnesses?

Mr. Sullivan: Yes, sir.

Mr. Freehill, for the libellant, states that he does not object to the admission of the evidence taken in the Municipal Court on the ground that the stenographer has not been called or on the ground that the minutes are not correct. As to the testimony of Alexander Simpson and William Rhodes he objects on the ground that they are not competent in a trial of this kind, and their admission cannot be based on Section 348 of the New York Civil Practice Code.

The Court: Then it stands this way: The claimants offer the evidence that was taken in the Municipal Court in the case of Stevens v. Alexander Simpson, Herbert Simpson and Wm. A. Rhodes; the libellant objects to the testimony [fol. 106] of Alexander Simpson and William A. Rhodes on the ground that the two men are dead, which fact is admitted by the other side.

Mr. Freehill: I object not on the ground that the stenographer is not called, not that those are not the minutes, but on the ground that they are not competent under any rule or statute here.

Objection sustained.

Exception.

Mr. Sullivan: May I have this marked for identification?
The Court: Yes.
Mr. Sullivan: I offer in evidence two bills of sale.

Received and marked Claimants' Exhibits F and G.

Mr. Sullivan: I offer testimony of Alexander Simpson and William A. Rhodes, taken in the Municipal Court.

Received and marked Claimant's Exhibit H, for identification.

Mr. Sullivan: I offer in evidence the order of the Municipal Court, marked Exhibit A, and the annexed summons and complaint and the answer in the Municipal Court case, Exhibit B, all documents being in the case of William Stevens against Alexander Simpson, Herbert Simpson and William A. Rhodes, and the certified copy of the document marked "Verdict," entered in the Municipal Court for the City of New York for the Seventh District, Borough of Manhattan, in the case of Stevens v. Simpson aforesaid.

Same is marked Claimant's Exhibit C.

[fol. 107] ALBERT BAUER recalled.

By Mr. Freehill:

Q. Mr. Bauer, did you have any conversation on the morning of October 20, 1925, with the claimant, Herbert Simpson?
A. No.
Q. With whom did you have a conversation?
A. I had a conversation with the captain of that boat.
Q. Mr. Rhodes?
A. I think that was the name.
Q. When did you give that receipt to Mr. Rhodes? Prior to the time the boat was delivered, or not?

Mr. Sullivan: I object to the question.
Mr. Freehill: He is not a party to the case.
Mr. Sullivan: I object to the question as incompetent.

Objection overruled.

A. I gave it to him after the boat was examined, after it was delivered.

Q. Was that before or after Mr. Rhodes and Mr. Simpson went to breakfast?

A. The receipt was given to Mr. Rhodes, who was the captain, when they returned from breakfast, but the damage was specified before they went to breakfast. It took me a little while to make that receipt up and they wanted to get ashore and to get that receipt.

Q. Where did you make that receipt out?

A. Right alongside of the "Drifter."

Q. Before they went to breakfast, did you call their attention to the damage?

A. The damage was called as soon as they put a line out on the dock.

[fol. 108] Q. Before they went to breakfast?

A. Sure, because I had the boat shoved off to see where the damage was done.

Q. What did Mr. Rhodes say to you at the time you called his attention to the damage?

A. I asked him how it occurred and he did not know how it did happen.

Q. That is what he said to you?

A. Yes, sir.

Q. Did he say anything about going to breakfast?

A. Yes, they asked me could they go to breakfast, and the Transmarine Plant is about five miles in length, and they have their own dining room, and it was only about five minutes walk.

Q. Did he ask for that receipt at that time?

A. Yes, he asked for the receipt as soon as he got to the dock. I said, "Hang a line on, I want to look at this boat. You have got a hole in her side." They wanted to get ashore. He said, "We've been up all night. Have you got charge?" I said, "Yes." He said, "We've not had anything to eat." I said, "You wait, you'll get something to eat, but wait, there's damage to this boat, I seen it coming up the canal." The canal is a mile and a half long.

Q. The question is, when you noticed this damage?

A. I noticed the damage when she was being under tow, when she was coming up.

The Court: You said this morning, as I understood it, that you yourself went back on this "Drifter" to the Consolidated Shipyards?

The Witness: Yes, sir.

The Court: And you said that you covered this hole in her side?

The Witness: I had it covered.

The Court: Was it bent in?

[fol. 109] The Witness: Stove in.

The Court: Leaking?

The Witness: Yes, she was taking water.

The Court: How fast was she taking water?

The Witness: The floor of the boat was wet then.

The Court: How far above the waterline was it?

The Witness: Well, I should think about three inches above the waterline, where the first break was.

The Court: How big around was this depression effect?

The Witness: Well, it took in, I think it was five planks, sort of about, it's like an egg shape, you know, and I should judge around a foot and a half.

The Court: And how thick was the side of the boat?

The Witness: The plank in the hull I don't think was more than half an inch. Something like that. I don't think it was half inch planking.

Q. When he requested you to give him a receipt, that was before he went to breakfast?

A. Yes, surely

Q. Then you went into a shanty and wrote out a receipt?

A. Sure.

Q. And that is a copy of the receipt that you gave him?

A. That is the original, I believe. I had to make out a duplicate in the Municipal Court, but that is the original. They were both alike, though.

[fol. 110] Q. Did he object to accepting that receipt?

A. Oh, no, he could not.

Q. Did he accept the receipt?

A. Absolutely.

Q. Mr. Bauer, it has been testified by Mr. Simpson that you had a conversation with him wherein you said that you discovered the damage as the boat was being lifted out of the water to be carried aboard some steamer.

A. Never.

Q. You had no such conversation with Mr. Simpson?

A. Certainly not.

Q. Or with Mr. Rhodes?

A. Certainly not.

Q. Did you put any lines around the "Drifter"?
A. No, sir. Wouldn't be allowed to.

Mr. Sullivan: Bauers testified that he did not put any around.

Q. Did anybody put any around before they went to breakfast?
A. I say no. The spreaders were there and the heavy slings and the cranes were waiting to take her up if she had been ready to put aboard the ship.

Mr. Sullivan: I object to any volunteer statements.

Cross-examination.

By Mr. Sullivan:

Q. I ask you to examine this paper marked Exhibit E of the libellant?
A. Yes, sir.
Q. You said a moment ago that was the original receipt?
A. Yes, sir.
Q. Do you swear to that now?

The Court: He said he thought it was.

Q. You swore that that was the original?
A. It was not on a yellow paper, I know.
[fol. 111] Q. Is that the original receipt you wrote out at that time?
A. Yes or no. I can't tell you that, yes or no.

The Court: This man testified that he thought it was the original receipt, and then again he said he thought it was the original receipt, and he explained further that he made a duplicate in the Municipal Court case.

Q. Is that the original receipt that you signed at that time, yes or no?
A. This is the receipt that I made out in my own handwriting.
Q. At that time?
A. I made two out. I can't swear that this is the one I made out at the time the boat docked there.

The Court: It is a true copy?
The Witness: It is a true copy, absolutely.

Q. Is that the original receipt?

A. This is the original receipt or an original copy. That is the only way I can put it.

Q. When did you first see the paper that is in your hand?

A. I saw it on the Transmarine shanty when I first saw it, before I made it out.

Q. Are you sure that you saw it there?

A. I am positive of it; that is where the receipt was made out. If it is not, then there was another made out for my own benefit.

Q. Another made out for your own benefit when?

A. When? At the time of the damage.

Q. Who made it out?

A. Myself.

Q. That is a yellow piece of paper?

A. Yes.

Q. There is no printing on it?

A. No.

[fol. 112] Q. Did you bring a piece of paper with you?

A. No, it is a piece belonging to the Transmarine.

Q. Is there any printing to that effect on the paper?

A. No, not that I can see.

Q. Did you write out more than one at that time?

A. I wrote out one, yes.

Q. Did you write out more than one?

A. Yes. I had to have it for my own protection.

Q. What was the other kind of paper that you wrote on?

A. Well, it was yellow paper, I remember that, I don't know whether it was the same or not.

Q. Why did you sign that receipt? Whom did you represent?

A. The Consolidated Shipbuilding Company.

Q. Then you received the "Drifter" for the Consolidated Shipbuilding Corporation at Port Newark on this occasion?

A. I was their representative.

Q. In what capacity?

A. Shipping clerk.

Testimony closed.

Counsel sum up.

Adjourned to 2:30 p. m., May 10.

New York, May 14, 1929—2 P. M.

(Case reopened. Appearances as before.)

Mr. Sullivan: I offer this in evidence, it has been marked for identification.

Mr. Freehill: Do I understand he is permitted to introduce additional evidence?

[fol. 113]. The Court: I reopened it on the point of res adjudicata. I thought we weren't going into anything except the res adjudicata.

Mr. Sullivan: But I wish to introduce this paper; it is just marked for identification. I offered it in once, and it was not my case at that time, and you said if we wanted to offer it in you would take it later. This is marked for identification by the other side.

Mr. Freehill: This is a statement of one of the claimants.

Mr. Sullivan: They had it identified, and produced it and referred to it in the testimony, and they didn't put it in evidence. I offer it in evidence.

Mr. Freehill: Your Honor, I object to that; it is a self-serving statement.

The Court: Who produced it?

Mr. Sullivan: They produced it.

Mr. Freehill: I have not offered it in evidence.

Mr. Sullivan: I do.

The Court: Mark it for identification. This is a statement, it won't do him any good. It is a self-serving declaration.

Mr. Sullivan: It is already marked for identification. The point is this was in the court below, and if they have any claim at all against Alexander Simpson, that action is still pending——

The Court: I know all about that. We are now talking about the res adjudicata.

Mr. Sullivan: Well, I offer it in evidence.

[fol. 114] Mr. Freehill: I object to it. It is reopening the case.

The Court: There is nothing in that.

Mr. Freehill: Then I object to the statement on the ground it is self-serving, not binding on the libellant.

The Court: I will exclude it because I think this is just a statement by your captain.

Mr. Sullivan: It is on that statement that the insurance was gotten.

The Court: I will not admit it; you may have an exception.

Mr. Sullivan: It has been marked for identification; I think it is No. 3.

The Court: And I exclude it on the ground that it is a self-serving document.

Now, the only thing I want to hear anything about is the res adjudicata.

CHARLES A. STRAUSS, called as a witness on behalf of the claimant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Sullivan:

Q. Have you the file from your Court, Stevens vs. Simpson, et al.?

A. I have.

The Court: Who is he?

Q. Did you state your full name?

A. Charles A. Strauss.

Q. What position do you hold, if any?

[fol. 115] A. Assistant clerk, Seventh Municipal Court, Manhattan.

Q. And you have been subpœnaed here?

A. I have.

Q. To produce the file in William Stevens vs. Alexander Simpson, et al.?

A. Yes.

Q. Have you that file with you, have you those files of papers with you?

Mr. Freehill: I object to the question on the ground he is trying to reopen the case.

The Court: I want to hear what this clerk has to say about the records of the court; that is all I want. Overrule the objection.

Q. You have the entire file?

A. As near to my knowledge I have.

Q. What is the file number of that?

A. 8891 and 12,322, 1926.

Mr. Sullivan: I offer——

The Court: What I wanted to know was about that document there, whether there is any judgment on the judgment book, or whether that forms a final judicial action in connection with this case; that is what I want to know.

Q. I show you Exhibit C, United States District Court, Southern District of New York, May 9, 1929. Have you read it?

A. Does this exhibit pertain to the papers in my possession?

The Court: It is a certificate of the decision of the Municipal Court in that case.

The Witness: Yes.

[fol. 116] Q. This is a certified copy of that paper, a certified copy of the record you just referred to?

The Court: No, it isn't a certified copy of the record; a certified copy of the verdict.

The Witness: It is so signed by our chief clerk.

Q. I ask you to read the body of it here, if you please.

The Court: He has read it.

Mr. Freehill: I object to it; it speaks for itself.

The Court: It speaks for itself. What else are you going to ask him?

Mr. Sullivan: If your Honor thinks that is sufficient evidence——

The Court: No, that isn't any further than it was before. I will question him.

By the Court:

Q. Is there any judgment book in which judgments are entered in your court to make a formal record?

A. We keep a judgment book.

Q. You do?

A. We do.

Q. And can a certified transcript of the judgment that was entered in this case be found in that book?

A. A record of the judgment can be found in that book, and a transcript issued therefrom.

The Court: That is what I mean.

Mr. Sullivan: Your Honor, it is no judgment, it is an order.

[fol. 117] Q. Would there be anything in that book to show a dismissal of this case as against the defendant, a dismissal of this case against the defendants, Alex. A. Simpson and William A. Rhodes?

A. All records would be in the docket book separate from the judgment book. That is the way our records are kept.

By Mr. Sullivan:

Q. That would be a docket of the case?

A. That would be a docket of the case, the entire proceedings of that case.

By the Court:

Q. And that shows all the proceedings in that case?

A. That shows all the proceedings in that case.

Q. In the judgment book would it be entered if there was a judgment dismissing the case against these two people?

A. If there was a judgment, that judgment would be entered in the judgment book and also in the docket book.

By Mr. Sullivan:

Q. Will you read that paper and see?

The Court: He has read it.

Q. Why couldn't there be a judgment——

By the Court:

Q. What is the last paper you have? You have a paper that corresponds to that in that file called the verdict?

A. Judgment or verdict.

[fol. 118] The Court: Have you ever looked at these papers?

Mr. Sullivan: Yes, that paper your Honor has will explain the whole situation. (Addressing the witness.) Will you look at that paper the Judge has, the paper that is torn?

The Court: Is this the original:
Mr. Sullivan: That is the original paper.

By Mr. Sullivan:

Q. Will you look at it, please? What paper is that?
A. Judgment or verdict.
Q. What does it show? Is that an official paper from your office?
A. Yes, 1926.
Q. Will you look on the back of it? Do you find R. G. there?
A. Yes, sir.
Q. What does that mean?
A. Reserved generally, at the time or day of trial.
Q. That would show that case has not been tried, reserved generally means it has not been tried?
A. Yes, that goes back to the trial again. That case has been tried previous to the R. G.; that was in court previous to that.

The Court: A disagreement of the jury, according to this.

Q. You notice on this other order it was dismissed as to the other two defendants, Alex. A. Simpson and William A. Rhodes?

Mr. Freehill: I did not hear that, your Honor. It is a mistrial, and it has not been tried over again.
The Court: Look at this.
[fol. 119]. Mr. Freehill: That is the verdict, no question about that, your Honor.
Mr. Sullivan: Marked dismissed as to these two.
The Court: This is the document that was put in evidence?
Mr. Freehill: Yes.
The Court: Here are two documents of somewhat similar purpose. One of them says judgment or verdict at a trial before Justice Genung on October 11, 1926.
Mr. Freehill: That was a mistrial.
The Court: Here is a document which is similar to the first part of this, and in which the judgment is not filled out, which says, "Dismissed with costs as to defendants Alex. A. Simpson and William A. Rhodes."

By the Court:

Q. Is this the final document of any kind in your court, and was there a judgment entered on that dismissal?

A. On that date this tells me that on this date it was dismissed without cost to the defendant.

Q. As to the defendant?

A. As to the defendant- Simpson and Rhodes.

Q. Alex. A. Simpson and William A. Rhodes?

A. Yes, that was dismissed on that date without cost to both those defendants.

Q. Is this in your court a final record or judgment as to those defendants?

A. This is the record of our court.

Q. This is the final record as to those defendants?

A. I cannot say whether that was final.

Q. It was dismissed against those defendants?

A. Yes, on that date.

[fol. 120] Q. Then that is the end of it as far as your court is concerned?

A. Yes, on that date. If there is anything in addition I would have to go through all these papers.

Mr. Sullivan: I think we will concede there is nothing after that. You have got the case marked reserved generally as to Alexander Simpson. Then the only part of the case remaining, these records show that the only part of the case remaining is the action against Alexander Simpson, it being dismissed against the other two defendants?

The Witness: That is what this paper tells me.

The Court: And this Exhibit C is a certified copy of the last document of which he has just produced the original.

Mr. Sullivan: Yes, he said it was certified by the Chief Judge.

The Court: Have you any other questions?

Mr. Sullivan: I think that is all, your Honor.

Cross-examination.

By Mr. Freehill:

Q. This is the verdict, is it not, Exhibit 3?

Mr. Sullivan: I submit, if your Honor please, the paper shows what it is.

The Court: I will allow it.

A. That is a verdict.
Q. That is not a judgment?
A. That is a verdict.
Q. That is not a judgment?

[fol. 121] The Court: That is what the paper says, it is a verdict. It says dismissed as to those two.

The Witness: Dismissed without cost as to defendants Alex. A. Simpson and William A. Rhodes.

By the Court:

Q. And there was a disagreement as to the other one?
A. There are three defendants in the case, nothing mentioned about the third.
Q. Doesn't it say, "Jury disagreed"?
A. This having been tried before Judge Davis, the jury rendered a verdict in favor and disagreed.
Q. And disagreed?
A. Yes.
Q. And dismissed without cost as to the others?
A. Yes, sir.

By Mr. Freehill:

Q. There is no question in your mind but what that is just the verdict and not the judgment?
A. That is the verdict.

Mr. Sullivan: There is no question about that being the verdict.

The Court: It is called that on the paper, but there is an order dismissing it on that paper.

Q. Don't you know that you cannot appeal from that, that you have to appeal from the judgment?

Mr. Sullivan: I object to that.
The Court: That is a question of law.

[fol. 122] Q. Would you receive in your court a notice of appeal from a verdict rather than from a judgment?

Mr. Sullivan: If the Court please, I object to that as calling for a conclusion.
The Court: That is a question of law.
Mr. Sullivan: I have the law right here if my friend wants to look at it.

Mr. Freehill: No, I have it.

Mr. Sullivan: They have to appeal within 20 days after the entry in that court. You do not have to serve, as in the higher courts, a copy of the order with the notice of entry.

The Court: You can give me a memorandum about that.

Q. Now, in order to have a final adjudication is it not a fact that you have to enter a judgment on the verdict rendered?

Mr. Sullivan: If the Court please, I object to that.

Mr. Freehill: I do not think that is objectionable.

The Court: I would rather have you ask him what his procedure is as a clerk; after a thing like that occurs, what happens next?

Q. After a verdict is rendered what is next done?

Mr. Sullivan: If your Honor please, there is no such proposition before this Court. The jury disagreed. There is a printed form of verdict, but there was no verdict, the jury disagreed.

[fol. 123] The Court: There is an entry there of the dismissal as to those two defendants, so it isn't a question of a verdict.

Mr. Sullivan: That other matter is not involved here, as your Honor remarked at first.

The Court: Ask him whether, if you have an order of dismissal of that kind, there is any judgment of dismissal.

Q. After a verdict or an order entered dismissing an action as to defendants, state whether or not it is a fact that a judgment must be entered upon that?

Mr. Sullivan: I object to it as calling for a conclusion, the witness not being shown qualified to speak. I have the law here, and my friend has the law.

Mr. Freehill: I am perfectly willing to rest on that, if this is what he calls a judgment.

Mr. Sullivan: It isn't a judgment, it is a final order. My friend is mixing it up. An order may be final and a judgment may be final.

By Mr. Freehill:

Q. Will you state what, as a matter of fact, is done after a verdict is entered or an order is entered dismissing the case?

Mr. Sullivan: There is no verdict here.
The Court: Leave out the verdict.
Mr. Freehill: Call it order or anything.

[fol. 124] A. What is done after a verdict is——

The Court: No, not a verdict. What is done after an order dismissing the case is entered? Is there anything else done?

The Witness: That is a matter left to the attorney to put in such claim as he sees fit.

Q. You mean a judgment?
A. Yes.

By the Court:

Q. What do you generally do?
A. If the attorney makes an application for a judgment after this time, the papers are gotten out, and if O. K., then the judgment is entered.

By Mr. Freehill:

Q. Then he gets a judgment on that?
A. Yes. There is a judgment entered after the verdict if the papers are O. K.

The Court: We are talking about orders of dismissal.
The Witness: We look upon that as a verdict.
The Court: It says verdict.
Mr. Sullivan: But here is what we are talking about, dismissed as to those defendants.
The Witness: That is a dismissal, that is the opinion of the Judge who had this case at the time.
The Court: That is his opinion, then?
The Witness: That is the Judge's opinion.
[fol. 125] Mr. Sullivan: He means decision; that is the Judge's decision at that time.
The Court: Will there be anything further entered on that afterwards?
The Witness: No, not on this.

By Mr. Freehill:

Q. In other words, a judgment could not be entered on that verdict?
A. You could make application——

Mr. Sullivan: I object, there is no verdict here.

Q. You could make an aplpication?

A. Yes.

Q. Since 1923 is it not a fact that the Legislature changed the Municipal Court Code in so far as the entry of judgments is concerned?

Mr. Sullivan: I object to that. If the law is changed he should produce the law.

Mr. Freehill: May I state this, that since 1923 judgments are not entered by the clerk as prior to 1923? Since that time, in order to get a judgment the attorney must prepare a form and present it to the Court and judgment is entered.

Mr. Sullivan: I have the facts right here.

Mr. Freehill: Now, I think it is quite clear, is it not, that in order to get a judgment the attorney must present the judgment to the Clerk?

The Court: Just like any other court.

Mr. Sullivan: No, we are not entitled——

[fol. 126] The Court: We are not going to argue it. Have you got a witness to call?

Mr. Freehill: Yes, I have.

The Court: Have you any further questions?

Mr. Sullivan: We do not depend upon a judgment. This is an order, and we are just as much protected——

The Court: That is a question of law.

Mr. Sullivan: Yes, that is for your Honor to decide.

The Court: I want to get at what the facts are about the judgments in this court. Have you any more questions to ask this man?

Mr. Sullivan: I did make a motion. I stated to your Honor before I made a motion pursuant to the practice of the Supreme Court to have a judgment entered, and the papers there show it, and that was denied. You cannot enter a judgment on an order. It isn't in that paper.

The Court: Have you got certified copies of those papers there?

Mr. Sullivan: I assume they are part of the files.

The Court: All we need in order to see what the issues were is to find out whether that was a final decision on that issue as to these two defendants.

Mr. Sullivan: The order is just as much a final decision as is a judgment.

The Court: That is a matter of law, but what I want to know is do you claim this is the final thing entered in this case?

[fol. 127] Mr. Sullivan: Yes.

The Court: He claims this is the final document entered in this case.

Mr. Freehill: I do not believe that that can be the final paper. I will say that that is the final paper in this action, and that no judgment has been entered on that paper.

The Court: Mr. Sullivan says so, too.

Mr. Sullivan: Yes, it stands just as it is; it is an order.

The Court: Then you stand on that just as it is that way?

Mr. Sullivan: Yes, sir.

The Court: All right, give it to me.

Mr. Sullivan: I offer that file in evidence.

The Court: He cannot leave his file here.

Mr. Sullivan: I will consent that he take it back, but we would be in this position, if your Honor would formally accept it in evidence, then he could take it back, and if any question arises we could furnish certified copies.

The Court: If you want to get a certified copy of this entire file you can get it, and then you can put that in evidence. I have no objection to that. You cannot ask a clerk to leave his file here, and I won't mark it in any way.

Mr. Sullivan: I thought I could save time by offering this file under the file number, and then if we would need any of those papers later on, we could have them certified.

The Court: You can have them certified if you want to, [fol. 128] and present them in court here as an exhibit. You can have them here tomorrow or the next day.

Mr. Sullivan: I do not want to have all those here. I just want to have on the record file number 891. It may be we would never need that again, but if there was any occasion to use it, we could get certified copies.

The Court: No, if you want to do that, you may have certified copies of the file presented to me by tomorrow or the next day, but you cannot leave it open that way.

Mr. Sullivan: But I can see no alternative; I think it is my obligation to get it in.

The Court: All right, you can get a certified copy of that file, what you think is necessary out of that file, and produce it to me. I suppose it will take a day or two. Produce it to me on Friday morning on the motion calendar.

OSCAR W. HOCHSTADER, called as a witness on behalf of the libellant, having been duly sworn, testified as follows:

Direct examination,

By Mr. Freehill:

Q. Are you one of the Clerks of the Municipal Court?
A. Yes.
Q. What court?
A. The First District Municipal.
Q. How long have you been such?
A. 23 years.
Q. I show you this Defendant's Exhibit C and ask you to state what that paper is?

[fol. 129] Mr. Sullivan: If the Court please, I object to that; the paper speaks for itself.

The Court: Sustained. That paper speaks for itself.

Q. Will you state whether or not that is the judgment entered in that action?

Mr. Sullivan: I object to that as improper and incompetent; the paper speaks for itself. Yes, sustained. If you want to ask him about the Municipal Court practice as to the Clerk's Office, as to the entry of an order, formal separate order in addition to this order written in there, you may do that.

Q. Mr. Hochstader, will you please describe the practice prevailing in the Municipal Court since 1903 with respect to the entry of verdicts, orders and judgments?

Mr. Sullivan: If Court please, I object to that as incompetent.

The Court: I only want to hear about the entry of a further formal order on that order of dismissal there.

The Witness: There should have been an order——

The Court: Wait a moment.

Mr. Sullivan: I object to that as incompetent, immaterial, irrelevant, improper; the paper speaks for itself.

The Court: I want to know whether you can have anything further in this Court.

Mr. Sullivan: They cannot impeach it. As the case stands before your Honor, both sides have conceded that

[fol. 130] that was the final order made in that action. As to something else, that is a matter of law.

The Court: I do not know whether I can tell whether it is a matter of law or not unless I find out what is the ordinary procedure in these courts. This may be the way they end things like that.

Mr. Sullivan: It is a statutory court, and every step is specified, both by the rules and by the Municipal Court Act. Any step outside of that isn't within the law.

The Court: All right, you can argue that question later, but there is no harm in asking this man whether the practice is to enter any further order.

Mr. Sullivan: It is calling for expert testimony on a subject that expert testimony is not admissible.

The Court: I should think a man who has been a Clerk 23 years ought to be expert on how they run their docket book.

(Argument off the record.)

By Mr. Freehill:

Q. Are you familiar with the practice prevailing in all the Municipal Courts in the City of New York?

Mr. Sullivan: I object.

The Court: Overruled; I would like to get the facts.

Q. Will you describe what practice is followed in the Municipal Court after the entry of that paper?

[fol. 131] A. This would be docketed as a verdict downstairs, a verdict of a jury.

The Court: There wasn't a verdict of the jury, they disagreed.

The Witness: This would be docketed then as a dismissal. There should have been a different blank altogether; this wasn't a proper form at all.

By the Court:

Q. This dismissal is separate from the verdict?

A. Yes; I know how it was done, but it should have been done on a different point altogether.

By Mr. Freehill:

Q. Will you describe the process after that paper is filed?

A. After it is filed, if there was to be a judgment on that dismissal, the attorney would have had to enter a judgment

on that dismissal, otherwise we couldn't issue an execution. It means nothing, it is just like a memorandum now.

Q. In presenting a notice of appeal is the appeal taken from that paper or from the judgment?

Mr. Sullivan: I object to that; that is going outside——

The Court: Sustain that.

Q. Then that paper is not the final adjudication?

Mr. Sullivan: I object to that. He has testified it is on the wrong blank, that is what he said.

The Court: That is right. I think I have got enough on that.

[fol. 132] Mr. Freehill: I have a record on appeal in a case of the Municipal Court here where it shows just exactly what is done on the judgments entered below.

The Court: I am not going to give a decision on that in this case now. Is there anything else you wanted?

Mr. Sullivan: May I hand up this memorandum?

Mr. Freehill: I want to call attention to cases where it shows you cannot take an appeal on this paper.

The Court: You can file it as a memorandum. The case is closed now, and I will decide it.

[fol. 133] HEARING TO ASSESS DAMAGES BEFORE THE COMMISSIONER

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

WILLIAM STEVENS, Libellant,

against

The Vessel "WHITE CITY," HER ENGINES, TACKLE, APPAREL, etc., Claimant

Hearing to Assess Damages, Held Before John L. Galey, Esq., Commissioner, at His Office, No. 27 William Street, New York City, October 16, 1929

Appearances:

Neil P. Cullom, Esq. (James E. Freehill, Esq.), for the Libellant.

Florence J. Sullivan, Esq., for the Claimant.

It is stipulated and agreed that the expenses of this reference be taxed as a cost, and that the statutory fee of the Commissioner be waived.

PATRICK S. JOLLY, being duly sworn and examined as a witness, testified as follows:

By Mr. Freehill:

Q. Mr. Jolly, what is your business?

A. Marine surveyor.

[fol. 134] Q. How many years have you been engaged in that line of business?

A. Ten or twelve years.

Q. Did you examine the yacht "Drifter" in or about October, 1925?

A. Yes.

Q. On what date and what place?

A. October 21, 1925, at the Consolidated shipyards, Morris Heights.

Q. Will you describe that boat at to its specifications.

A. Why, the boat was a 40-foot motor boat, and the planking was double plank—that means she had an inner and outer plank, and that the inside plank put on first; screw fastened and the outside goes on and covers the laps in the seams so that by damaging the outside planks——

Mr. Sullivan: I move to strike out the observation about damaging as a conclusion rather than an answer to the question.

The Commissioner: I think the witness is an expert, isn't he?

Mr. Freehill: Yes.

Mr. Sullivan: Haven't you got the specifications—put them in evidence.

The witness shows Mr. Sullivan a paper.

The Commissioner: I think I will deny that.

Q. Is there any further information you can give with respect to the type of that boat?

A. Nothing else.

Q. Will you refresh your memory from this report if necessary to give further details (showing witness paper).

Mr. Sullivan: If you please, I object to that. There is no [fol. 135] basis laid for that question for him to consult a report. There is no question before the Court. I don't object to having him read——

By the Commissioner:

Q. Do you remember the details of your examination without referring to that report?

A. All that I know is that the boat was damaged——

Mr. Sullivan: I object to that on the ground that the answer be yes or no, whether or not he remembers it.

The Commissioner: I think he can state to what extent he remembers it.

Mr. Sullivan: This boat that we are speaking of hasn't been identified with this action so far.

The Commissioner: Well, that's subject to connection, of course—all this testimony.

Mr. Sullivan: If they are able to do it at all, they are able to supply that connection now, and we can give the thing sequence. It's very hard for trial counsel to remember all these things.

Q. This testimony relates to the "White City"?

A. No, the yacht "Drifter."

Mr. Sullivan: Mr. Commissioner, I suggest—apparently they have a physical description of the "Drifter." That's the boat they claim was damaged. If they have I will consent to having them spread it on the record or submit it so that it can be marked as an exhibit now.

[fol. 136] The Commissioner: Well, is there any question as to there being more than one "Drifter"?

Mr. Sullivan: Just a moment—I personally, your Honor—I do not think there is, but as an attorney representing my client I can't permit them to go ahead except on due course of evidence.

The Commissioner: I think I will permit them to offer testimony as to the condition of the yacht "Drifter" and later supply any necessary evidence to show that the "Drifter" examined was the "Drifter" referred to in the interlocutory decree.

Mr. Sullivan: Mr. Commissioner, the other part of my suggestion is that they put in the physical description of the boat now if they have it.

The Commissioner: I think I will let him put in his proof in the order in which he planned to do it, subject to your motion to strike out.

By Mr. Freehill:

Q. Now, Mr. Jolly, at the time of your examination what did you see with respect to that boat as to its condition?

A. Why, on the starboard side amidships——

Mr. Sullivan: Mr. Commissioner, I don't want to depart from the usual course of examination, but I have to object to that. There is no time set—no location.

The Commissioner: I think he stated the time and place when he examined the boat.

[fol. 137] Mr. Sullivan: I didn't catch it. May I ask the stenographer to tell me what time it was.

The stenographer does as requested.

Q. Now will you answer the question—about the condition of the boat at the time you saw it?

A. On the starboard side amidships there were two planks broken and this boat being a double-plank boat it necessitated taking off——

Mr. Sullivan: I object to that. He is giving a description of the physical damage to this boat. That doesn't call upon him to give any opinion—speculative opinion as to how it happened.

The Commissioner: Well, I don't think he has done that yet. I have to wait before passing on your objection until he gives some such speculative opinion.

Q. Will you refer to your survey report and state just exactly what you found on that yacht "Drifter."

Mr. Sullivan: I object to that as calling for a conclusion. The question first addressed to him was to describe what he saw and——

The Commissioner: No; I think that's a fair question—objection overruled.

Mr. Sullivan: Exception.

A. I found four broken planks on the starboard side amidships, the flagpole broken and the stem band broken.

[fol. 138] Q. What work did you recommend to be performed on that yacht in order that it be put in good condition?

Mr. Sullivan: I object to that as improper and incompetent.

The Commissioner: Objection overruled.

Mr. Sullivan: Exception.

A. Why, you would have to drydock the boat, haul her out, remove the broken planks and renew them—renew the flagpole and the stem and, and to get at these planks on the inside you have got a lot of removals because they are copper fastened and these yachts are built so close and the machinery and equipment is put in so fine, there isn't any room for a man to work, and you have to take them out of the way, and that's where the cost runs up considerably.

Q. Did you recommend that the yacht be painted?

A. Oh, well, of course that's included—the boat has to be painted all over, inside and out.

Q. Did you recommend that the socket of the flagpole be renewed also?

A. Yes, yes. I meant to include that.

Q. Is this the report that you made respecting your observations and recommendations (showing witness paper)?

A. Yes.

Mr. Freehill: I offer that in evidence.

Mr. Sullivan: I object to the acceptance of this paper in evidence on the grounds that it goes further than the testimony of the expert with respect to the damage and physical condition and includes what purports to be a history of how [fol. 139] the accident happened. I object to it further on the ground that the witness has testified fully with respect to the survey examination made and his testimony is primary evidence and this paper is secondary evidence. The paper is hearsay. If the Court please, I am quite serious in my objection. By putting in that paper, which I think is within his testimony, they also have imbedded in the lower part of that sheet of paper what purports to be a description of how the accident happened. Now he is not an expert on that.

The Commissioner: Well, it's usual to accept these surveys on references to assess damages for the purpose of

placing on the record an accurate statement as to the actual damage sustained by the vessel. The report is of course not proof with respect to any recitals as to matters not within the knowledge or observation of the witness, and as I read this report it purports merely to set forth the contents of the log with respect to the accident. Whether the excerpt quoted is in the log or not I don't know and the report is not evidence as to that fact, but I will accept it as evidence in respect to the damages sustained by the vessel. The report is admitted for what it is worth and will receipt no weight except as to matters within the personal observations of the witness.

The report is marked Libellant's Exhibit 1.

Q. Mr. Jolly, I show you this paper enumerating the amount of work, labor and services performed in connection [fol. 140] with the repair of that yacht "Drifter," and ask you to state whether or not that is in your opinion a fair and reasonable value for that work, labor and services performed, on that boat.

Mr. Sullivan: I object to that as leading.

The Commissioner: I think that's a fair objection. The question may be put in another way to satisfy the rules of evidence.

Mr. Freehill: I withdraw the question then. I will read in the amount of work that has been performed——

Mr. Sullivan: I object to that. Counsel can't testify. They can't read into evidence things like that.

Mr. Freehill: I have a witness.

Mr. Sullivan: Well, produce him.

The Commissioner: You want to prove the reasonableness of the bill?

Mr. Freehill: Yes.

The Commissioner: I will permit you to submit that and later offer proof.

Mr. Sullivan: I object to that. There is no evidence of what repairs, if any, were done.

The Commissioner: I think I will let him follow the order which he is following in putting in the proof, subect to your motion to strike out.

Mr. Freehill: May I have this paper marked for identification.

The invoice is marked Libellant's Exhibit 2 for Identification.

[fol. 141] Q. I show you this paper marked Libellant's Exhibit 2 for Identification, and ask you to state whether or not, in your opinion, the amount of that bill was fair and reasonable for the work, labor and services performed.

Mr. Sullivan: I object to that. It is not shown that he had any personal knowledge that the work was done or that he saw any of it.

The Commissioner: I will let the witness answer that question.

Mr. Sullivan: Exception.

A. (Referring to exhibit.) Yes.

Mr. Sullivan: I move to strike out the answer, your Honor.

The Commissioner: Motion denied.

Mr. Sullivan: Exception.

Q. Was that work and labor and services enumerated in that exhibit necessary to put that boat in good condition?

A. Yes.

Mr. Sullivan: No further objection is necessary—you have ruled on it?

The Commissioner: I understand that you object to that.

Cross-examination.

By Mr. Sullivan:

Q. Mr. Witness, I now address my questions on cross examination to Libellant's Exhibit 1, October 16, 1929, which I show you (showing witness exhibit). Now, what do you call this paper?

A. That's a survey report.

[fol. 142] Q. Did you dictate it?

A. Yes.

Q. Before you dictated it, as I understand, you examined this boat called the "Drifter"?

A. Oh, yes, I went up to the Consolidated and looked the boat over and then I came back to the office and had that report written up.

Q. I see this is on a blue paper—this exhibit.

A. I guess so.

Q. Those are blanks you have in your office?

A. Regular form.

Q. It's a blank you have in your office?

A. I suppose so—whatever paper is there. They are all the same kind. I don't just get what you mean?

Q. Is Exhibit 1 a blank that you have in your office?

A. This here is the printed form (referring to stop sheets) and these papers are blank (referring to following sheets).

Q. Then Plaintiff's Exhibit 1 is on a printed form that you have in your office?

A. No, no, it's the same as that. We make half a dozen, or whatever it is.

Q. But you have the blanks in your office to start with?

A. Blank sheets—I don't write that; it's written by the stenographer.

Q. Will you tell me whether or not that's written on a blank obtained in your office?

A. I don't know; it probably is.

Q. Where did you get this paper?

A. I signed it.

Q. That's the first you saw it?

A. First time I saw it, yes—the time I saw it—I signed it, yes.

Q. When you made your examination of the "Drifter," did you write down what you saw?

A. Right.

Q. Where is that paper?

A. In my notebook.

[fol. 143] Q. Where is your notebook?

A. In my pocket.

Q. And have you compared your notebook with Plaintiff's Exhibit A?

A. I don't know. I couldn't get that unless I put it down out of it.

Mr. Freehill: Do you want him to compare it now? I will have him do it.

No answer by Mr. Sullivan.

Q. Where was this "Drifter" when you examined her?

A. She was at Consolidated Shipbuilding Company's plant, Morris Heights.

Q. In drydock?
A. No.
Q. In the water?
A. Right.
Q. Have you a picture of this "Drifter"?
A. No, sir.
Q. Do you know where you can get one?
A. No. We don't as a rule bother—sometimes we do but in this case we didn't bother taking pictures. We don't make a habit of taking pictures. I didn't know this was coming this way or I probably would have.
Q. Now, which part of this "Drifter" was—did you say there was a hole there——
A. It was pushed in—there wasn't a hole.
Q. There was no hole?
A. No, sir, it wasn't a hole. She was broke.
Q. Mr. Jolly, do you say that a part of the boat was broken?
A. Right.
Q. Describe the part that you say was broken.
A. Why, her hull plating was broken on the starboard side amidships just about the water line—or at the water line.
Q. Can you describe that more fully—just what you mean by broken?
A. A broken plank—the plank was pushed in, but it was not holed.
[fol. 144] Q. Will you tell the Court—will you describe the part that was pushed in as you have observed it.
A. All that I know that the hull planking was pushed in there covering about 12 or 14 inches diameter.
Q. Describe this indentation you speak of. Was it round or oblong or what was its form?
A. Its formation, as I remember it, was what you call round.
Q. Did you make a drawing?
A. No, sir.
Q. Do you say anything in your report as to whether it's round or oblong or that it had some other shape?
A. No, not that I know of.
Q. Nothing of that in your report?
A. No—I say no—I don't think there is—I don't know; I might have said something up here (referring to Exhibit 1).

Q. Suppose you satisfy yourself.

Witness refers to the exhibit.

Mr. Freehill: Isn't this immaterial, Mr. Sullivan?

Q. Is there anything in the report on that question?

A. Only in the statement, that's all, but not in my findings. In my findings up there it says something about a hole.

Q. Well, let us have it then; what does your report say on that?

A. Well, it says—the log states—this is not my statement, understand—they discovered a hole on the starboard side.

The Commissioner: Doesn't the report speak for itself as far as that is concerned?

Mr. Sullivan: Yes, but I am not bound by his report, your Honor.

[fol. 145] The Commissioner: But you are bound by what's in his report.

Mr. Sullivan: Oh, I take exception to that, if your Honor please. We are not bound by what is in his report.

The Commissioner: I am afraid you misunderstand me. When you ask the question, "What is in your report," you are bound by the paper itself which is already in evidence and I don't think it is worth while to ask him what was in the report when the report is already in evidence. Of course you are not bound by its accuracy or truth.

Mr. Sullivan: I take exception to your Honor's ruling.

Q. Can you tell now, from your recollection, whether or not you put anything in your report as to the shape, form and depth of that depression that you speak of?

Mr. Freehill: I object to that as immaterial.

The Commissioner: I think I will overrule that. The report speaks for itself.

Mr. Sullivan: I am not attacking the report. I am asking for his independent recollection, your Honor.

The Commissioner: Well, that's a different question, but that wasn't what you asked.

Question read.

A. No, I haven't, not in my report.

Q. Why didn't you?

[fol. 146] Mr. Freehill: I object to that as immaterial.

A. I am not supposed to.

Q. What do you mean by you are not supposed to?

A. We don't state in there——

Q. No, no; what do you mean by you are not supposed to?

A. Well, it's a report of the damage. I don't state whether it's a hole that long, or that long, or the sizes. I didn't know this report was coming where it is or I probably might have elaborated on it.

Q. Wouldn't the size and depth of the hole be some element of the damage?

A. Well——

Q. No—yes or no.

A. Read that again, please.

Question read.

Q. Yes or no.

The Commissioner: Well, I won't compel the witness to answer that question yes or no.

Mr. Freehill: You may answer.

A. Well, it does make some difference—it does make a difference.

Mr. Freehill: Go ahead.

A. (Continuing:) The bigger the hole the more damage.

Q. Did you measure the hole?

A. No, sir.

Q. Well, I understood you to say there was no hole?

A. There wasn't any hole—no—it was broken.

[fol. 147] Q. Well, you have used the word "hole" in your testimony; do you desire to correct it?

A. I suppose I should correct it. It was broken.

Q. It was not a hole?

A. It was not what I call a hole, no.

Q. Did you measure the—let me see what was that you called it—depression; did you measure the depression?

A. No, sir.

Q. Well, do you mean by depression that at the point where this something came in contact with the surface of

the boat, that at that point it did not confirm with the rest of the surface of the boat—do you understand me?

A. That's right—it was set in.

Q. Then it must have sunk in a little bit, this depression; otherwise it wouldn't be a depression?

A. Sure, it was in.

Q. Will you tell the Court what was the depth of that depression?

A. I couldn't tell you, Mr. Sullivan.

Q. You said before you didn't measure anything——

A. No, I didn't.

Q. Well, can't you give us some idea—your best judgment now—as to the depth of the depression with respect to the surface of the boat; of course I mean the surface along the side.

A. I can't tell you but I can give you some idea—as far as my memory goes. I remember it was set in three-quarters of an inch and covered twelve to fourteen inches; that's just——

Mr. Freehill: Over the surface?

The Witness: Over the surface, 12 or 14 inches diameter and set in perhaps three-quarters of an inch.

[fol. 148] Q. I take it, of course, from the surface of the boat to the greatest depth of the depression, that it graduated?

A. Oh, it's bound to.

Mr. Freehill: That's self evident.

A. (Continuing:) I didn't know just what you wanted. I didn't measure this thing or go into it so technically fine.

Q. You looked at it, Mr. Jolly?

A. Right. The planks were broken. That's all that interested me.

Q. Was the depression of equal depth?

A. No.

Mr. Freehill: I object to it as already answered.

Q. Well——

A. That's as I remember it.

Q. Did this depression graduate from the surface to the maximum depth of the depression?

A. It went from the center out to the circumference. The greatest depth was in the center of this—dish shape, you might call it.

Q. You say as you now recall it the depression was substantially round?

A. As I remember, it was——

Q. But you made no written memoranda of it at that time?

A. No, no; the planks were broken; that's all that I was interested in.

Q. You mean to say that that total depression was 14 inches?

Mr. Freehill: I object to it. It's already been gone over.

Q. (Continuing:) I mean from the break of the surface.

[fol. 149] Mr. Freehill: I object to it as already testified to.

A. That was the diameter, and it formed some kind of an irregular circle, as I remember it.

Q. Well, suppose we try to solve the mystery——

A. I don't know just what you are trying to get at.

Q. Have you any idea what could have caused that?

Mr. Freehill: I object to that as immaterial. The Court has already found that they caused it.

The Commissioner: I will allow the question.

A. I would say it was caused by either a drift log or bumping up against the dock or something—looked to me like it was done by a log or piling of some sort.

Q. When you were inspecting this depression that you referred to, where were you?

A. At the Consolidated Shipbuilding Company's plant, Morris Heights.

Q. No, no—were you on the "Drifter" when you inspected it?

A. Yes and no; I was on it and off it.

Q. Well, as it suited your convenience to make the inspection, you were either on the "Drifter" or off it, as you desired?

A. Yes.

Q. How far was this depression below the—what do you call it—the rim of the boat—the top of the side of the boat——

Mr. Freehill: The deck.

Mr. Sullivan: That's good enough.

[fol. 150] A. I guess about 2 feet, I am not sure—below either your covering board or your deck—that's really what you are getting at——

Q. Yes, covering board. You mean by covering board or deck the top of the boat?

A. Yes.

Q. You say that was two feet below?

A. Two feet below the main deck—around the water line.

Q. Was the depression below or above the water line?

A. Right in the water line, somewheres around there. I can't just give the exact location.

Q. How long did you spend making the inspection—I mean of this depression?

A. I didn't waste very much time; I saw the depression—the planks were broken, and then we went around inside the vessel.

Q. Can you give an estimate of how long you spent looking at this depression?

A. I couldn't tell you, no.

Q. A minute?

A. Oh, more than that.

Q. Well, suppose you tell me——

Mr. Freehill: He says he doesn't remember. I object. He has already testified he didn't remember.

Q. (Continuing:) Give us some estimate, Mr. Jolly.

A. Why, it might have been five or ten minutes, I don't know.

Q. Was this boat tied to the dock, as you saw it, or how—how was it fastened?

A. Tied up to the dock with a mooring line.

Q. The boat was in the water?

A. Yes.

Q. When you arrived there, was anybody in control of the boat?

[fol. 151] Mr. Freehill: That's immaterial.

A. I really don't know.

Q. Was anybody present with you when you made this inspection?

A. Yes.

Q. Who was it?

A. There was the superintendent of the yard, Mr. Christian—I guess it was, Christiansen.

Q. Did you ever work at repairing boats?

A. I served an apprenticeship in a machine shop where—I served time in a machine shop in Yarmouth, Nova Scotia.

Q. Did you ever make any repairs such as specified in Libellant's Exhibit 2 (showing witness exhibit)?

A. I didn't do any work—but I did some pipe fitting and electrical work and stuff like that.

Q. My question, Mr. Jolly, is in reference to Libellant's Exhibit 2, with respect to which you testified on direct examination (showing witness paper). Now, I repeat my question—did you ever personally do the work specified in Libellant's Exhibit 2?

A. All that—no.

Q. Not on this boat—on any boat in your line?

A. No, no. I am not a yacht builder, no, sir.

Q. Did you prepare this paper called Libellant's Exhibit 2 (showing witness paper)?

A. Which do you mean?

Q. That whole paper.

A. No, no; I have got nothing to do with that. I don't make out bills. I just get the damages.

Q. Will you please state what you mean by damage so far as your survey is concerned?

Mr. Freehill: I object to this as wholly unnecessary and immaterial.

[fol. 152] A. I get the damage that's on the boat.

Q. Do you mean by that, that you inspect this depression that you speak of and you see how far it has affected other parts of the boat, is that correct?

A. I simply get——

Q. No, just—is that correct?

A. No.

Q. Well, by damage you mean the injury to the boat itself, do you not?

A. That's it.

Q. You have nothing to do with the dollars and cents part?

A. Yes, sir, I do.

Q. Well, you say you did not make out this bill?

A. No, sir.

Q. Did you put in any of these charges that are on Libellant's Exhibit 2?

A. No, sir.

Q. You had nothing to do with the making out of this bill?

A. No, sir.

Q. You reported the physical condition of what you call a depression, is that it?

A. The damage, yes, sir.

The Commissioner: The report speaks for itself, Mr. Sullivan.

Q. Now, what do you mean by your report——

Mr. Freehill: I object to that.

The Commissioner: I sustain the objection.

Mr. Sullivan: Exception.

Q. Were you present when these 49 hours work of painters was going on?

A. All the time?

Q. Yes.

A. No, sir.

Q. Take this first item—49 hours——

[fol. 153] The Commissioner: Well, now, just let's see if we can't shorten this.

By the Commissioner:

Q. Do you personally know that any of these items of work described in Libellant's Exhibit 2 was performed?

A. All that work was done.

Q. You were present while this was done?

A. No, no, I can't—no, I will have to take that back. I don't know whether that was done or not, no.

Q. You didn't supervise the actual work of the repairs?

A. No, sir; no, sir.

Q. All you can say with regard to this paper is that in your opinion the total is reasonable for the work described in the paper?

A. That's it.

Q. Is that the extent of your testimony?

A. Yes, that's it.

By Mr. Sullivan:

Q. On what do you base your opinion that these 49 hours of painting at $73.50 are reasonable?

A. Well, I will tell you—we had to put in some new planks——

Q. No, no, no——

Mr. Sullivan: If the Court please——

Q. (Continuing:) On what do you base the reasonable charge?

A. For the simple reason the boat had to be scraped all over——

Q. Mr. Witness, you do not understand my question. You say the $73.50 is reasonable—now why do you say it's reasonable. We will assume they did the work—now why do you say——

[fol. 154] Mr. Freehill: Mr. Commissioner, I object.

The Commissioner: I think his answer was pertinent to your question.

Mr. Sullivan: Well, then, I will ask a new question, with your Honor's permission.

Q. You say this charge of $73.50 for 49 hours of painting is reasonable; now on what do you base your statement that that's reasonable—that that figure is reasonable for that number of hours of painting?

Mr. Freehill: Suppose you give him the bill.

A. Well, I tried to explain to you before, when they put the new planks in—you can't just slap——

The Commissioner: He is asking you how do you know that $1.50 an hour is a reasonable charge for painting.

A. (Continuing:) Oh, those are standard rates; they run around that.

Q. Standard rates—what's your source of information as to standard rates for painting?

A. Well, we have other bills like that, and we have got some——

Q. Your source of information that this is reasonable then comes from bills, is that it?

A. Indirectly, yes.

Q. Well, is that your only source of information?

A. I never did any painting. I never worked as a painter—I don't——

Q. My question is, is your only source of information as to this charge being reasonable the fact that you have [fol. 155] seen it on some other bill?

A. It's the standard price that they pay around these different yards.

Q. I have asked you what's your source of information as to it being standard——

A. We have done it around other yards and had it done there before.

Q. Can you remember a single instance in which they paid $1.50 an hour for painting such as was done on this boat?

A. No, I can't tell you.

Q. Now, what was painted?

Mr. Freehill: He has testified already, your Honor.

A. The hull was to be entirely re-painted.

Q. What do you mean by the hull?

A. That's the outside of the boat.

Q. The entire outside of the boat?

A. The entire outside of the boat.

Q. Both sides?

A. Both sides.

By the Commissioner:

Q. Why did you have to paint the whole boat when the damage was limited to an area of 14 inches?

A. This was a brand-new boat; it never had been in commission, and if you take and paint—you have got a damaged plank here—broken—and paint, it will show right up, and you have got to cover it to make it match—that's what they tell me.

By Mr. Sullivan:

Q. Who tells you that?

A. The owner.

Q. What owner?

A. Any owner.

Q. Can you name one?

A. No.

[fol. 156] Q. Well, the owners are not experts in boat building, are they?

A. No, but they are——

Q. And you can't remember any owner that told you that?

A. No.

By the Commissioner:

Q. You repaint the whole boat on both sides——

A. Just like an automobile, you get a fender that's broken——

Q. Did you repaint the boat on both sides from the deck down to the water line?

A. Yes.

Q. You didn't paint below the water line at all; you didn't put her on drydock?

A. I don't think so, no.

Q. And no painting inside?

A. Yes, it had to be painted inside where the men had been working.

Q. Well, did you have to paint it all over inside or just in the area of the damage?

A. I don't know how much they did there. It was to be painted as required.

By Mr. Sullivan:

Q. Well, who was to do the requiring?

Mr. Freehill: I object to that as immaterial.

A. It's up to the yard to make that boat right.

Q. Well, the yard is inanimate. What human being had part in it or required this?

Mr. Freehill: I object to that as immaterial.

[fol. 157] Q. (Continuing:) You said "as required". I ask you by whom?

A. The yard was delivering a brand-new boat and they were to put her back as she was originally.

Q. The yard couldn't require it; the requiring must be done by a human being. What human being?

A. The superintendent—Mr. Christiansen.

Q. Do you know if he required it?

A. Yes, sir.

Q. How do you know that?

A. He told me so.

Q. He told you so?

A. Yes.

Q. Now, in your survey did you recommend the painting—the repainting of this boat on the outside all around?

A. I didn't specifically state that, no.

Q. Just what was the purpose of your survey?

A. To find the damage.

Mr. Freehill: I object.

The Commissioner: I think that question has already been covered by the testimony.

Q. Well, before you made this survey, did you have a contract with anybody to make it?

Mr. Freehill: I object to it as immaterial.

The Commissioner: I will allow him to answer it.

A. I don't just get what you mean by a contract.

Mr. Freehill: Does he mean who directed him to make a survey or——

The Commissioner: I think the question isn't very clear. I suggest you make the question a little clearer to him.

[fol. 158] Q. How did you come to go to make this survey?

Mr. Freehill: I object to it——

The Commissioner: Overruled.

A. It's on my report there.

Q. Who ordered you?

A. I don't know who requested it. I am a salaried man. I am not paid so much a fee for a survey.

By the Commissioner:

Q. You were ordered by your superior in the United States Salvage Association to go down and make this survey?

A. Right, and it states so at the top——

Q. Did you have any personal dealings with the libellant in this case prior to making this survey?

A. I don't get that——

Q. Did you have any personal communication with the owner of the boat?

A. No, no, no.

By Mr. Sullivan:

Q. Was that request for you to make this survey in writing?

A. Yes, yes, we have a form that these are made out on.

Q. Have you that form?

A. No, I don't know where that is.

Q. Well, what is the fact—that the Consolidated Shipbuilding Company employed the company for which you work to make the survey, and your company sent you up there, is that it?

Mr. Freehill: I object to that——

A. I don't know. My boss told me to go up there, there was a damage on this boat, and to go up there and make the survey.

[fol. 159] Q. Do you know who employed the company for which you work?

A. I don't know. It may be in the report there. I don't know.

Mr. Freehill: What difference does it make, Mr. Commissioner?

The Commissioner: Well, apparently he wants to go very carefully into the relations of the surveyor with the owner. I think you have gone pretty far in that direction already.

Q. Have you got that—the written directions—with you?

A. No, no; it's filed away.

Q. Can you tell me what they are?

A. It's only a form that states the steamer, and then the date is at the top, and the location of the boat, and sometimes it gives the damage and sometimes it doesn't.

Q. I assume that you know what they mean by a survey?

A. Absolutely.

Q. Does your survey indicate what repairs must be done?

A. Yes.

Q. Have you any paper here that will show what recommendation was contained in your survey with respect to painting?

A. Only what I have got there.

The Commissioner: This survey is in evidence already, Mr. Sullivan.

Q. Will you point out in Plaintiff's Exhibit 1 what recommendation you made with respect to painting.

A. (Referring to exhibit) All the work to be painted or recoated as originally (indicating).

Q. You refer to item "C"?

A. Note "C".

[fol. 160] Q. And note "C" is all paint work to be coated as originally?

A. That's it. She was to be painted as she was——

Q. As originally?

A. Yes.

Q. That's the extent of your report with respect to painting?

A. Right.

Q. You made no further recommendation with respect to painting?

A. No.

Q. Did they come back and ask you after that survey was made whether or not they should paint the hull of the boat?

A. No.

Q. Do you know how many coats they gave the boat?

A. No, sir.

Q. Do you know whether or not the boat was painted below the water line?

A. I don't know.

Q. How many hours did painters work at the time this work was done—when this bill was made up?

A. I don't know.

Q. When I say how many hours, I mean how many hours per day?

A. Oh, eight hours a day—8-hour day.

By the Commissioner:

Q. I should like to ask you, Mr. Jolly, if it was necessary to—how large an area was actually renewed in the hull of the boat. You say the damage was limited to 14 inches each way, but I assume they have to take the planks out and put in new planks. Now how long were these planks?

A. I think the planks were—I am not sure—but I think the planks were about 20 feet long. I am not sure of that. They run—one may go forward and one may go aft. I couldn't state right now which way they run. I state 20 feet—they may be longer than that. The planks all start with the bow and the butts have to be shifted so as to [fol. 161] allow for suitable strength. They can't be put in one place, in other words.

By Mr. Sullivan:

Q. Did you make any recommendation as to how to repair the boat?

A. Not in detail. I said simply renew them. They can put the boat upside down or any way they want to, I don't care.

Q. Now, you take this depression you speak of. You say that maximum was 14 inches, somewhat round, irregular. How many different ways are there in order to remedy that depression?

A. Well, there is only one way in this boat. This was a new——

Q. No, no—how many different ways—you are an expert——

The Commissioner: I don't think that question is clear. I don't understand it myself.

A. Well, the planks have to be renewed from butt to butt as they were originally built, and if run from the bow to the stern, they have to be rebuilt that way.

Q. Did you recommend to take out the planks that were affected by the depression?

A. Yes, sir.

Q. Where is that?

A. Item 1 (indicating on exhibit).

Q. Item 1 reads as follows "Four planks broken to be renewed at butts"?

A. Yes.

Q. Now you have explained in reference to butts and the Referee knows all about it. You don't know how long those planks were?

A. No, I don't remember.

[fol. 162] Q. How much of the area of the boat above water—to take one side—for instance, it will be two feet above the water line and so many feet long—of course that will be the same dimension on the opposite side of the boat, wouldn't it?

A. Yes.

Q. What was the total area of one side of the boat above the water line from end to end?

Mr. Freehill: I object to it as immaterial.

The Commissioner: I will let him answer it if he can.

A. Why—I see what you are getting at. That boat is 43 feet long. You have got that length on both sides and then it came down—I said approximately 2 feet, it might have been 4 feet but I said 2 feet—if that's what you are after.

Q. Have you any means of informing us now how much of the side was above the water line, as you saw the boat on the day you made the inspection?

A. I don't just get what you mean—how much the boat is out of the water.

Q. You say one time—I don't mean to intimate that you are contradicting your story, but you have estimated on one occasion that it might be two feet above the water line——

Mr. Freehill: He did not. He said two feet above the deck.

Q. (Continuing:) from the top of the deck to the water line—about two feet—now you say it may be more. Now my question is: independent of which is greater, have you any means of telling us now how much of that boat was above the water line?

[fol. 163] Mr. Freehill: I object to the question because the witness has testified that it was two feet, to the best of his recollection, below the deck and right at the water line:

The Commissioner: I think the witness has already testified that the distance from the deck to the water line was two feet. I don't see why you——

Mr. Freehill: Well, he varied that—I want him to straighten that out.

By the Commissioner:

Q. What was the distance you say——

A. I don't know that I varied. I said approximately two feet.

By Mr. Sullivan:

Q. Then the area of one side would be found by multiplying two by the length of the boat?

A. Somewheres around there, yes sir, somewheres around there.

Q. I am speaking of the surface, of course—the exterior of the boat?

A. Yes, of course it's not exactly straight, understand. The boat runs off——

Q. Well, you claim to be an expert?

A. Oh, get that—I am not an expert. I am not claiming that. I am just simply a surveyor.

Q. What do you say is the area of one side?

The Commissioner: We can multiply two by 43.

A. I am not here as an expert. I want that understood. I am just a plain surveyor.

Q. That would be 86 square feet to paint, wouldn't it?

[fol. 164] Mr. Freehill: I think I can supply a blueprint or specifications.

Mr. Sullivan: Now just a minute——

A. 43—as I told you, the boat had a sheer. She is not straight.

Q. What was the bend of the boat?

A. I don't know. I am not an—I don't know; if you get the——

The Commissioner: He is not an expert.

A. (Continuing:) It might be three feet—I am only giving you my opinion, as I remember it.

Q. Well, in any event, as nearly as you could judge, the top of the boat was two feet above the water line?

A. Yes.

Q. And 43 feet long—now that was the part that was painted on each side of the boat?

A. Yes, sir.

The Commissioner: He has already testified to that several times.

Q. We will assume, subject to your correction, that there is 86 square feet to be painted. I say I will assume it without you being responsible for it——

A. On one side.

Q. Now, how many days do you estimate it would take *to* a man to paint those 86 square feet?

A. Do you mean one coat of paint or how many coats?

Q. Well, take one coat. That's all you say, on the outside, the thing as it was painted.

A. If everything was all ready for painting.

Q. Yes. There is the boat ready to be painted and there is 86 square feet of surface to be painted. Now how many days working eight hours a day do you say he ought to take to paint one side?

[fol. 165] Mr. Freehill: I object to it as immaterial.

The Commissioner: I will allow it.

A. That wouldn't take a day.

Q. How long would it take?

A. It would take him half a day.

Q. Then for both sides it would be double that?

A. Somewheres around there, yes.

Q. Is there anything on this Libellant's Exhibit 2 that would indicate to you the number of coats of paint that was put on that boat (showing witness exhibit)?

A. Not from there, no.

Mr. Freehill: I object to that as immaterial. It's self evident.

The Commissioner: I think the question is fair.

Mr. Freehill: If you will state that the exhibit does not state exactly how many coats of paint it has there, I certainly will concede it. You don't have to ask him any question about that.

Mr. Sullivan: All right—well, it's in the evidence. There is nothing on this to indicate how many coats of paint.

Q. Do you know of any reason why a foreman should supervise painters beyond the period of time that the painters would be engaged in painting the boats. I refer to here "4 hours foreman at $2, $8". My question is, do you know of anything in your experience that would require a foreman to stay there after the boat was painted?

A. Not after the boat was painted, no. I guess he would look it over to see that it's all right.

[fol. 166] By the Commissioner:

Q. Does that relate to the services of a foreman in supervising both the painters and electricians and carpenters and pipe fitters—all the workmen?

A. Apparently it does. They distribute so much on these pro rata for each job.

By Mr. Sullivan:

Q. I call attention of the witness to the following item—four hours painters' foreman at $2, total $8. Did I read it correctly, Mr. Witness (showing it to witness)?

A. Four hours foreman—you read it right.

Q. For painters?

A. Yes.

Q. Does that entry mean to you that that's all the time that the painters were engaged?

A. No, the foreman simply has a——

Q. Just answer the question. Does that entry on Libellant's Exhibit 2 indicate to you that the foreman remained there until the boat was painted?

A. No.

Q. Is there anything on that Libellant's Exhibit 2 that indicates the contrary, so far as the painters are concerned?

Mr. Freehill: I object to it as relating to some paper in evidence.

The Commissioner: I think, since the witness has testified with regard to the paper and the reasonableness of the charges, I will allow the question.

Question read.

A. I don't know of anything.

Q. What's your answer?

A. I can't answer it. I don't know whether——

[fol. 167] Q. Why can't you answer it?

Mr. Freehill: I object.

The Commissioner: I don't think that's a fair question. He says he doesn't know.

Q. In October, 1925, do you know what the working hours of ship carpenters were?

A. As far as I know, they were eight hours a day.

Mr. Freehill: We are not charging here for day work. We are charging only for hour.

Q. Were you there when the ship carpenters were working on the repair of this boat?

Mr. Freehill: I object to it. He has already testified he wasn't there.

The Commissioner: He admits he wasn't there.

Mr. Freehill: If it would clear it up, Mr. Sullivan, I will admit that this man wasn't there when any of this work was done.

Mr. Sullivan: Your admissions don't help me any.

The Commissioner: The witness has testified he wasn't there when any of this work was done, so there is no use going into that.

No answer made by the witness.

Q. Did you ever work as a ship carpenter?

A. No, sir.

Q. What work was there for a ship carpenter to do?

A. Why, he had four planks there that he had to take off, put back; he had to fix that flagstaff and there was—inside there. There was some ceiling and lockers and things like [fol. 168] that to be renewed.

Q. Does your report specify what the ship carpenters had to do?

A. Not in detail. It gives it roughly there.

Q. Well, you know where it is on here (showing witness exhibit).

A. You have got four planks there broken—those are wood—to be renewed. You have got a flagpole. And then removals—they come in under there.

Q. Then the work, if you will please state so I will have it all in one answer—what work was there for the ship carpenters to do on this boat under your survey?

A. I can only give you—you have got four hull planks, flagpole and the necessary internal removals.

Q. Do you mean to say that 14 inches would span four planks?

A. Yes, sir.

Q. How long would it take to remove those four planks—would there be one man or two men—how were they working?

A. Oh, they probably have three or four men there.

Q. To remove one plank?

Mr. Freehill: Four planks it was.

Q. (Continuing:) You would have to remove one at a time?

A. There was two broken on the outside.

Q. Now, you take these four planks—let us take two men as a unit so we can figure it out. How many hours would it take them to remove the four planks?

A. That varies. It depends on how easily they come off. I couldn't tell you whether it would take eight or 24 or 80 hours.

Q. What would they have to do to remove one plank—let's take one plank.

A. Well, I tell you those planks are copper fastened.

[fol. 169] Q. On the inside?

A. Inside and out.

Q. They are copper——

A. Copper riveted.

Q. Copper riveted?

A. Yes.

Q. Well, where is the rivet flattened—on the outside or the inside?

A. I guess it's on the outside. I don't know.

Q. Well——

A. (Continuing:) On the inside, I think.

Q. Well, I think we had better assume it's on the inside. I have no idea or purpose of confusing you. Let's say it's on the inside. Now, they have a head on the rivet and it goes through and then is it tightened by—what do you call it—a nut?

A. No.

Q. Or is it flattened by putting it in hot and applying pressure to it?

A. No, it's put in cold.

Q. I am quite familiar with riveting, but in my day it was put in hot——

The Commissioner: These are copper rivets.

A. These are copper, you know.

Q. Well, just how is the operation that you call riveting completed; what do you do?

A. By simply—you drill your hole and put your rivet in; one fellow holds on to the head of the rivet on one side and the other man is on the other side and they hold on and the other man rivets it through.

Q. How does he rivet it—by causing a hammer to come in contact with it?

A. Oh, just a little hammer or tool.

Q. And he flattens it on the inside?

A. Yes, sir.

Q. You spoke of a washer that's put between the flattened head on the inside and the inside of the boat.

[fol. 170] A. That's put between the wood. If he didn't, you know he would hammer back on the wood and split it.

Q. How many of those rivets were in each one of those planks that you saw?

A. Good gosh, I can't tell you.

Q. Can't you estimate?

Mr. Freehill: I object to it. He said he couldn't testify.

The Commissioner: I will let him answer.

A. I don't remember.

Q. It's quite important, if you please, for my purpose. Where are these rivets affixed—just on the inside of the face of the boat or is there a plank on the inside or something; these rivets are like nails that are so far apart, aren't they?

A. They fasten to the frame of your boat.

Q. That's not the outside or the inside of the boat. The frame is independent of what you call the hull, isn't it?

A. Well——

Q. Yes or no; the frame is independent of the hull, isn't it?

A. It forms part of the hull.

Q. Well, they are considered separate units, are they not?

A. Yes.

Q. Well, don't take so long to tell me. Well, how many rivets would you say—give your best estimate—in each plank?

A. I can't tell you. I have forgotten what it is.

Q. You say in 14 inches there were four planks?

A. Yes.

Q. Four will go into 12 three times—three and a half inches?

A. It depends on the spacing——

Q. Well, let us take it 14 inches—that would leave four planks three and a half inches wide?

[fol. 171] A. I don't know—I think the planks were wider than that.

Mr. Freehill: I object to this as wholly immaterial.

Q. You say four planks—the depression on the exterior of the boat was, you estimate, 14 inches, roughly, in diameter. Let's take the extreme diameter—14 inches. You say there were four planks. Four will go into 14 three times and a half, won't it?

A. Well——

Mr. Freehill: Pardon me—two outside and two inside—seven inches abreast.

A. (Continuing:) This thing—you have got me wrong in that average. That 14 inches might only be an inch on one and cover 13 inches on the other.

By the Commissioner:

Q. How wide are the planks on the outside?

A. I think they are about eight inches but I am not sure. I can't tell you.

Q. You say there was an inside ceiling?

A. No, she is double planked, this boat is.

Q. How wide are the planks on the inside?

A. I think they run around 8 inches, but I am not sure.

Q. Same width outside and inside?

A. I think they are.

Q. When you say on your report four planks to be renewed, do you mean four planks in the outer sheathing or four altogether?

A. Four altogether.
Q. Only two planks on the outside?
A. Two planks on the outside, right.

[fol. 172] By Mr. Sullivan:

Q. Do these rivets you speak of go through both planks?
A. Yes, sir.
Q. How long would you say the rivets were?
A. I don't know, whether they were two inches or what—they got to go through the two thicknesses of plank——
Q. Take the width of the planks; the rivet would have to be longer than two planks——

The Commissioner: Why do you go into this, Mr. Sullivan? The length of the rivets—is it important in any respect?

Mr. Sullivan: No, except, Judge, it's in reference to this item of charge. I want to get some basis to figure how long it would take to take one of those planks out. It isn't of very great importance——

The Commissioner: I think you are going into somewhat over-elaborate detail in your cross examination.

Q. (Continuing:) These four planks you speak of in item 1 in your survey means two planks on the outside and two on the inside?
A. Right.
Q. And whatever depression was on the outside was not greater than the width of two planks?

The Commissioner: He has already testified to that.

A. The width took two planks.
Q. Can't you tell us on reflection about how many bolts were put in those planks to hold them there?
A. I don't remember. I don't know how long those planks were.
[fol. 173] Q. Well, they couldn't be over—what's your estimate of the maximum length of those planks?
A. I thought they were about 20 feet.
Q. How many bolts would be necessary to hold those together?
A. I don't know how the framing was on them. I have forgotten. It makes a big difference whether your frames are that near together or that near together (indicating).

Q. Take the nearest that you can imagine. How close would be the nearest that you could imagine, of the frame——

The Commissioner: I don't think that's material in this case. We are getting into speculative territory now.

Mr. Sullivan: It's necessary to get the basis of how many rivets he had to take out.

The Commissioner: Well, he says he doesn't remember——

Q. (Continuing:) Well, now, Mr. Jolly, can't you tell the Court by way of an estimate how long it would take competent ship carpenters to take out one of those planks that you saw in making your survey—how long it would take to take one of those out?

A. You mean if everything was all clear?

Q. Yes.

A. Why, it would probably take from two to three days to get those out.

Q. Well, I said one—just to take one plank out.

The Commissioner: I don't think that is material. They take them all out together.

Mr. Freehill: I object to it as immaterial.

Q. (Continuing:) You would have to take one out first, wouldn't you?

A. I have forgotten just how it was inside there, but a [fol. 174] man has to go inside to drive out those rivets after they drill the heads off.

Q. He wouldn't have to take a train to do it, the boat was right there, he would step out or step in?

A. Well, there is two men work on those jobs.

Q. Let us dispose of this at once. Can you estimate how many rivets were in each of those planks you saw in respect to which you made your survey?

Mr. Freehill: I think he has testified.

The Commissioner: I think he has testified to that—that he does not remember. That's the question he was asked a number of times.

Mr. Sullivan: Well, your Honor, he has been varying—that the plank was this long or that long. I just want to summarize it.

A. I am giving you the best I have got. That happened a long while ago——

Q. Yes, but 20 feet then are 20 feet now, rivets then are rivets now, two and two still make four—did you ever take a plank out of a boat such as you reported on?

A. No, sir, I never did.

Q. Let us take one plank out. What would have to be done?

A. They have got to take and drill all the heads where they riveted over—drill that out.

Q. How is that done?

A. They have a little drill or drilling machine or hand drill, I guess they probably have an electric drill, and they drill those out.

Q. How long would it take to drill one?

A. It depends how fast these fellows work. I don't know.

Q. Let us take it just as slow as it could work and have it operate. How long would it take them——

A. I don't know.

[fol. 175] Q. Would it take an hour?

A. It might take an hour.

Q. Did you ever see it take an hour?

A. No.

Q. How big an area did the drill have to remove?

A. It all depends on how much it is riveted over——

Q. Let us take one——

A. I don't know.

Q. Did you see these rivets?

Mr. Freehill: He said he didn't.

The Commissioner: Let him answer the question.

By the Commissioner:

Q. Did you see the rivets?

A. I saw some of them, yes, sir.

By Mr. Sullivan:

Q. How large was the rivet that had to be drilled?

A. I don't remember, and——

Q. You say you saw some of the rivets, didn't you?
A. Yes, sir.
Q. Give us the best recollection of how much it was——
A. About 5/16th—3/8ths of an inch, I don't know.
Q. You mean in diameter?
A. That's where it's riveted over.
Q. Then all this drill would have to do would be to take off that 5/8ths of an inch?
A. 3/8ths—not 5/8ths.
Q. 3/8ths——

The Commissioner: Now that's been gone into and gone over a number of times and I think we are wasting a lot of times without much result.

[fol. 176] Q. (Continuing:) Can you now tell us about how long an efficient driller, working on that 3/8ths or 5/8ths of an inch head of a rivet would require to take the rivet out of the boat?
A. I don't know.
Q. Would it be an hour?

The Commissioner: He said he doesn't know and I don't think I will allow any further questions.
Mr. Sullivan: Well, saying he doesn't know doesn't usually prohibit from giving some estimate.

Q. (Continuing:) Can you give us an estimate?
A. No, it depends on the conditions.
Q. Let's assume all the conditions are normal, with an efficient mechanic and an efficient machine operating, as you understand them to operate, how long should it take?

Mr. Freehill: I object to it.
The Commissioner: Objection sustained.

Q. Take this flagpole and socket broken—well, how large was the flagpole?
A. As I remember it, about an inch and a half or a quarter in diameter, perhaps four or five feet.
Q. Four or five feet long——
A. Something like that—as I remember it—I may be wrong.
Q. The flagpole is a piece of wood?
A. Yes, sir.

Q. What do you say that was worth—the cost—have you any idea?

A. That had the fittings on it, you know—you mean just the stick?

Q. Take the flagpole first—the flagpole you say is half an inch wide?

A. About an inch and a half in diameter.

[fol. 177] Q. And about four feet long?

A. Somewheres around there.

Q. What kind of woód?

A. I don't know unless I put it down there.

Q. Well, don't you know what bolts of that size are usually made out of?

A. They have them all kinds of wood.

Q. Take the very best wood you can think of.

A. They have oak, pine, spruce——

Mr. Freehill: There is no testimony here as to any wood, Mr. Sullivan.

Q. Oak—what would that cost?

A. By the time they turned it up it might cost $2 or $3, I don't know.

Q. You say this socket was broken. That's the arrangement that holds the pole to the boat, is that right?

A. Yes.

Q. Like an old-fashioned carriage you put the whip in the socket?

A. That's right.

Q. What was the socket made of?

A. Some—I don't know whether it was cast iron or cast brass, to tell you the truth.

Q. If it was cast brass?

A. $25 or $30.

Q. If it was brass?

A. Yes.

Q. And you don't know whether it's brass or not?

A. No.

Q. Did you look to see what the pole was made of before you made your report?

A. The which?

Q. You made a survey here; before you made the written report called your survey, did you look and see what that pole was made of?

A. Yes, but I have forgotten.

[fol. 178] Q. Is there anything in your memorandum book that will tell us what that was made of?

A. No.

Q. Is there anything in your memorandum about this broken socket?

A. No.

Q. What that was made of—the socket?

A. No.

Q. What removals—you have here in Item B——

A. As I remember it——

Q. Just a moment—item B reads "Any removals to effect repairs to be replaced in good order as before." What did these removals consist of?

Mr. Freehill: He has already testified to that, your Honor—removing the machinery.

The Commissioner: I will let him answer that.

A. Well, to begin with, there was machinery—it was right in the machinery space where this damage was—and then——

Q. What machinery?

A. There was some pump there.

Q. What part of the pump?

A. I couldn't tell you, it's so long ago I can't remember now.

Q. You keep in mind the location of this depression in the boat you speak of—do you keep that in your mind?

A. In this particular case, yes.

Q. And how far was that from the head of the boat?

A. The which?

Q. What do you call it—the prow—is that the head of the boat?

A. The bow—it was amidships; the report states that, doesn't it?

Q. Is it your testimony that there was machinery directly on the inside where this depression was on the outside?

A. Yes, sir.

[fol. 179] Q. Now, you said it was a pump—I asked you what part of the pump but you didn't answer that question.

A. I told you I didn't know.

Q. Well, what kind of a pump?

A. I couldn't tell you. I don't know. I don't remember now.

Q. Do you know whether or not they had to remove the pump or any part of it to do that work?

A. Yes, sir.

Q. From your personal observation?

A. Yes, sir.

Q. After it was done?

A. Sir?

Q. Were you there when they were removing the machinery at this point?

A. No, sir.

Q. Were you there after it was done?

A. I was there when the survey was made.

Q. Were you there when they removed the pump or any part?

A. No, sir.

Q. Were you there after it was removed, if it was?

A. No, sir.

Q. That's one of your specifications in Item B as to things that were or might have been removed. Now what's your next specification—what's your next item of removal?

A. I am only giving you, as I remember now. If you had asked me at the time of that accident, I could have told you the whole thing, but to ask me now after this is all over——

Q. It's no fault of mine that I didn't ask you before——

A. The ceiling——

Q. What ceiling?

A. Inside—and those planks run into the quarters—they not only run into the engine room compartment but they go through fore and aft in the quarters. They extend——

Q. As I understand, you testified before that you didn't know how long the planks were. You testified that before.

[fol. 180] A. I said approximately 20 feet in my testimony.

Q. Didn't you testify before that you didn't know how long they were?

The Commissioner: His testimony is clear on that point. I remember that. He said he didn't remember how long the planks were but he thought they were about 20 feet long.

Q. Well, all right, continue—what was the item that we are trying to get at here—the second item of removal——

A. I don't——

The Commissioner: He said he doesn't recall but that the planks run into the quarters.

Q. Now, you have specified that there may have been a pump or part of a pump. Now you have gone on to a second item and I don't quite understand——

A. The damage was in the way of the engineroom and in the way of the engineroom there was a pump and those planks run fore and aft into the quarters.

Q. What other items besides the pump——

A. I don't know. There might have been a whole lot more stuff there.

Q. Why didn't you say that before?

A. I tried to tell you but you seemed to want something and I didn't know what you were after.

Redirect examination.

By Mr. Freehill:

Q. Mr. Jolly, during the course of your duties as a surveyor, have you been called upon to let out repairs on vessels that you have surveyed?

[fol. 181] Mr. Sullivan: I object to that. They have already gone over that.

The Commissioner: Objection overruled.

A. Yes.

Q. Do the shipbuilding companies invariably charge $1.50 for the work of painters?

Mr. Sullivan: I object to that as improper, and incompetent, and not the proper way to show damage, the witness not——

The Commissioner: The form of the question is objectionable.

Q. What is the customary charge per hour for painters?

Mr. Sullivan: If you please, I object to that as improper and incompetent, the witness not shown qualified to speak——

The Commissioner: Can't you qualify him on that?

Q. How many years have you been engaged as a surveyor?

A. Ten—a little over ten.

Mr. Sullivan: He has testified before that he knows nothing about charges.

The Commissioner: I will let him answer that question. I don't think he testified to that.

Q. How many times have you been called upon to make arrangements with shipbuilding companies for repair of damaged vessels?

A. On the average of one or two surveys a day.

[fol. 182] Q. I ask you to examine this paper and state whether or not the charges per hour for help or labor is customary and reasonable (showing witness Libellant's Exhibit 2).

Mr. Sullivan: I object to that as improper and incompetent, the witness not shown to be qualified to speak.

By the Commissioner:

Q. How long have you been a surveyor?

A. Over ten years.

Q. Before that you worked in a machine shop?

A. Machine shop—in repair yards.

Q. Have you worked in repair yards?

A. Worked in repair yards.

Q. Doing work on wooden ships?

A. Mostly steel boats—no, they are steel boats.

Q. As a surveyor, have you had occasion to survey damage to wooden boats frequently?

A. All the time.

Q. And do the parties ever submit to you the specifications for repairs and do you pass on the reasonable cost of making repairs?

A. Yes.

Mr. Sullivan: I object to your Honor's questions as leading and incompetent.

The Commissioner: No, I don't think they are leading and incompetent.

Mr. Sullivan: I take exception, if your Honor will.

Q. Have you ever had occasion to estimate as a surveyor the cost of doing carpenter work on a wooden vessel or doing painting work on a wooden vessel?

[fol. 183] Mr. Sullivan: If you please, I object to that as improper and incompetent and not the proper way to prove that the witness is qualified and it does not prove or tend

to prove the market value of the work charged for and material used.

The Commissioner: I think you are quite right in that, but he is not trying to prove that.

A. Yes.

Q. How often?

A. Why, every other day I am on these jobs.

By Mr. Freehill:

Q. Will you please examine Libellant's Exhibit 2 for Identification and state whether or not those charges for labor were found by you to be reasonable and customary?

Mr. Sullivan: We desire to object on the ground that the witness is not shown qualified to speak. It's improper and not the proper measure of damage and it is not proof of any damage that would naturally result from any accident resulting in the depression specified as happening to the boat "Drifter."

The Commissioner: I will take the testimony for what it's worth.

Mr. Sullivan: May we have an exception?

The Commissioner: Yes.

Question read.

A. Yes.

[fol. 184] Q. Is the charge of $1.50 per hour for painters customarily and usually made by shipbuilding companies?

Mr. Sullivan: I object as not the proper form for the question, the witness not shown qualified to speak and not the proper way to show the varying rate of wages or the market value of the items charged for, and there is neither time nor place mentioned..

Q. (Continuing:) Well, we will say for New York City in or about October, 1928.

Mr. Sullivan: Same objection.

The Commissioner: The form of the question is objectionable. I think you ought to ask him what a reasonable rate was.

Q. (Continuing:) Will you state what was the reasonable and customary and usual rate for painters in New

York City in October, 1925, made by shipbuilding companies?

Mr. Sullivan: Same objection.
The Commissioner: Objection overruled.

Q. (Continuing:) Refer to that paper——

Mr. Sullivan: If you please, you can't hand him a paper.
The Commissioner: No, the paper has nothing to do with that.

Q. (Continuing:) For foreman painters $2, coppersmith $2, electricians——
A. $1.50.
[fol. 185] Q. Ship carpenters?
A. $1.50.
Q. Ship carpenter—foreman?
A. $2.
Q. Laborers?
A. $1.
Q. Pipe fitter?
A. $1.50.
Q. Power saws—the use of power saws per hour?
A. $1.50.
Q. Hauling and launching from October 21st to October 29th?

Mr. Sullivan: If the Court please, what does he mean by that hauling and launching?
Mr. Freehill: This boat had to be hauled up on the ways and launched. There was a charge for that.

A. $35.

Mr. Sullivan: I object, if the Court please. There is no basis for that testimony. Hauling and launching doesn't mean anything. When, where, to what extent—what?
The Commissioner: He has already specified the time——

Q. And for lay days what do they usually charge?
A. $30.
Q. Per day?
A. Yes.

By the Commissioner:

Q. Just what do you mean by that?

A. You see, it cost more to haul out a boat and launch it than to let it lay on the railroad and let them work.

Q. You mean for use of the railroad—lay days on the railroad?

A. That's right.

[fol. 186] By Mr. Freehill:

Q. Before this work was commenced, did you take up the items of repair with the Consolidated Shipbuilding Corporation or one of their representatives?

A. Yes.

Q. Who was that, do you recall?

A. Mr. Christianson.

Q. Did he indicate the items of repairs that would be necessary to put this boat in the same condition as it originally was?

A. Yes.

Mr. Sullivan: I move to strike that out. It's incompetent, irrelevant and immaterial. That's conversation between people that had nothing to do here.

The Commissioner: I don't think that's proper——

Mr. Freehill: I don't think it's very important anyway.

Mr. Sullivan: I move to strike it out.

The Commissioner: Motion granted to strike it out.

Q. From your inspection, would you say $810.81 was or was not a fair and reasonable charge for repairing the damage that you observed and which you testified to here today?

Mr. Sullivan: We object to that, if the Court please, as incompetent, improper and calling for a conclusion.

The Commissioner: I will take it for what it's worth.

A. I did.

[fol. 187] Recross-examination.

By Mr. Sullivan:

Q. Did you ever employ any painters personally?

A. Yes.

Q. Did you ever employ ship painters in the year 1925?
A. No.
Q. Did you employ any foremen in the year 1925?
A. No, no.
Q. Did you employ any coppersmiths in that year?
A. No.
Q. Did you employ any electricians in 1925?
A. No, sir.
Q. Ship carpenters?
A. No, sir.
Q. Ship carpenter foremen?
A. No, sir.
Q. Laborers?
A. Not around a shipyard, no, sir.
Q. Pipe fitters?
A. No, sir.
Q. Did you buy any paints in 1925?
A. No, sir.
Q. Did you buy any ship carpenters' material in 1925?
A. Not that I know of.
Q. Did you employ any power saws?
A. No, sir.
Q. Did you employ any tugboat in that year?
A. I may have but but I don't remember.
Q. Wnen did you ever employ a tugboat at all?
A. We may have——
Q. No, no; when did you——

Mr. Freehill: There is no testimony on that tugboat—he didn't testify about a tugboat.

Q. Did you employ any tugboats in 1925?
A. Not directly, no.
Q. Did you ever employ any tugboat?
A. Not directly, no.
Q. You have got here tugboat charges to and from steamer, $150. Now what kind of a tugboat did you have [fol. 188] in mind?
A. Why, you can get various tugboats.
Q. No, no; what kind of a tugboat did you have in mind on this item where it speaks of $150 here?
A. Any ordinary tugboat that could tow that boat.
Q. What kind of a boat have you in mind——

Mr. Freehill: I object to that as immaterial.

The Commissioner: I don't think that's material. The towage is the important thing.

A. Well, you wouldn't have a great big towboat——

Q. Just what kind of a tugboat——

Mr. Freehill: I object to that as immaterial.

The Commissioner: I think it's immaterial. Towboat is a service.

Q. (Continued:) These towboats' charges vary, do they not, in proportion to the size——

A. Not necessarily——

Q. (Continuing:) their hull——

A. Well, that has something to do with it.

Q. (Continuing:) and their equipment?

A. Yes.

Q. What kind of a boat did you have in mind with respect to this $150 charge——

A. Just an ordinary small towboat.

Q. What distance did you have in mind that they would tow?

A. From the Consolidated down to Port Newark there.

Q. Don't you know that there wasn't any such thing in this case; that the "Drifter"—there was no charge—this case is not before this Court—for charging to bring that [fol. 189] boat down from the Consolidated shipyard to Port Newark, don't you; in fact, that isn't in this case at all?

Mr. Freehill: I object to that as immaterial. That is in the case.

The Commissioner: I don't think this witness can answer that anyway. Objection sustained.

Q. What distance did you tow from the Consolidated shipyard down to Port Newark?

A. I don't know how far it is, maybe 15 miles, I don't know what it is.

Q. Do you happen to know what the rate of charges for towage for 15 miles was in that year?

A. Towboats run around $10 to $15 an hour.

Q. How long would it take to go 10 or 15 miles?

A. Well, that depends again on the conditions of the tide.

Q. Let us get it both ways. Let us—with no tide.

Mr. Freehill: I object to that as immaterial.

The Commissioner: I will allow that.

A. I don't know, maybe five or six hours, all depends.

Q. Five or six hours to go 10 miles?

A. It depends on how you are going—with a tow, understand.

Q. I am taking a condition where there was no tide——

The Commissioner: Does the towboat have to go to the yard and get the boat, as well as take the boat away?

[fol. 190] Mr. Sullivan: Your Honor, he says 10 or 15 miles.

Q. (Continuing:) Now, my question is how long would it take to go 10 miles, no tide, with the boat you had in mind when you made this charge of $150?

A. I don't know just what you——

The Commissioner (to the witness): Do you know what the question is, Mr. Witness?

The Witness: I don't exactly——

Question read.

A. (Continuing:) An ordinary boat should tow four or five miles an hour.

Mr. Freehill: Here is the bill; it's only one towage—$75.

Mr. Sullivan: That was a round trip (referring to the bill).

Q. This tug that you speak of—have you in mind that the tug is to be paid for the round trip or for one way or what?

A. They are paid for the time they are on the job.

Q. Does that mean that they are paid while they are taking the boat down—towing the "Drifter" down and then coming back themselves?

A. No, it means the actual time they are working for you.

Q. Well, does this figure that you have got here, $150—was that for the actual time that the tug was away from its base of operations?

A. That takes her down and takes her back.

Q. Well, you don't know how it was towed down, do you?

A. No, no.

[fol. 191] Q. You have been in this matter long enough to know that it was a little motor boat that took this down, don't you?

A. I don't know whether it was motor or steam.

Q. Haven't you heard the "White City" testified to?

A. Yes.

Q. That's not a tug at all, is it; it's a motor boat?

A. It's not a regular tugboat, no.

Q. It's a motor boat?

A. It can do towing.

Q. Is that the kind of a boat you had in mind when you estimated this $150?

A. Not exactly.

Q. Well, you must have had some definite thing in mind when you fixed a sum of money——

A. When you figure a towboat—I figured a regular towboat. I didn't know it was a launch or a towboat or whatever it is there (referring to billhead). I don't know as it makes much difference.

WILLIAM J. BOLEN, being duly sworn and examined as a witness, testified as follows:

By Mr. Freehill:

Q. Mr. Bolen, is this a bill rendered for the towage of the "Drifter" from Port Morris to Port Newark (showing witness paper)?

A. Yes, sir.

Q. And is that the check given in payment of that bill (showing it to witness)?

A. It is.

Mr. Freehill: I offer both of those papers in evidence.

The bill is marked Libellant's Exhibit 3 and the check is marked Libellant's Exhibit 4.

[fol. 192] Q. Mr. Bolen, is the yacht "Drifer," about which Mr. Jolly has just testified, the same yacht "Drifter" which was the subject matter in the action in the Federal Court, entitled Stevens against the "White City"?

A. Yes.

Q. Did you see the yacht "Drifter" at the Consolidated Shipbuilding yard, Port Morris?

A. Before it went away, yes.

Q. Did you see it afterwards?

A. I think I did see it afterwards.

By the Commissioner:

Q. You mean before it was damaged?

A. Yes, before it was taken away.

By Mr. Freehill:

Q. And you saw it afterwards?

A. Yes.

Q. Did you order the repairs to be done on the yacht "Drifter"?

A. Yes.

Q. Whom did you instruct to do this work?

Mr. Sullivan: Just a moment, I object to this as incompetent and irrelevant. It hasn't been shown what relation this man sustains to this "Drifter" or under what right or authority he acted.

By the Commissioner:

Q. By whom were you employed?

A. The Consolidated Shipbuilding Corporation.

By Mr. Freehill:

Q. What were you duties there, Mr. Bolen?

[fol. 193] The Commissioner: I will let him ask the questions the way he wants to and I will pass on them in regular order.

Q. (Continuing:) What are your duties?

Mr. Sullivan: I object to that as incompetent, irrelevant and immaterial.

The Commissioner: Overruled.

Mr. Sullivan: Exception.

A. I am cashier of the company and issue all orders to the shop for work to be done. All orders go through my hands.

Q. Did you order the work to be done on the yacht "Drifter"?

A. Yes, sir.

Q. Did your company build this yacht "Drifter" originally?

A. Yes, sir.

Q. And did your company repair the yacht "Drifter" after Mr. Jolly's survey?

A. Yes, sir.

Q. I show you this bill and ask you to state whether or not that enumerates correctly the items of work performed on that boat as well as the material furnished.

A. (Referring to bill.) Yes.

Mr. Sullivan: I object to the form of the question as incompetent, irrelevant and immaterial, the witness not shown qualified to speak.

The Commissioner: I don't think it is proper in form and I don't think the witness has been qualified to answer the question. I sustain the objection.

Mr. Freehill: I withdraw the question.

[fol. 194] Q. Will you state what items of work were performed on this yacht "Drifter" and what materials?

Mr. Sullivan: I object to that unless the witness speaks from his own knowledge and what he saw or what he learned in the proper way to make him a proper witness.

By the Commissioner:

Q. Were you present while the repairs were being done?

A. I was in the plant.

Q. You were the cashier?

A. I am the cashier and I have charge of all of these orders and the bills as they are made up and go out.

Q. Are the time books turned over to you to compute the——

A. The cards are turned in every day and we have a department that takes care of that and figures up the time and checks up the payroll.

Q. Who makes out the cards?

A. The men make up the cards and the foremen O. K. them.

Q. And that's turned over to you?

A. Every day it's turned over to the office.

Q. And who fixes the compensation per hour which the men are to receive and the charge per hour for their service?

A. That's fixed by the executives of the company.

Q. You simply apply that rate to the time cards that are handed in to you?

A. Exactly.

The Commissioner: I think you will have to limit the testimony of this witness to what he actually knows.

Mr. Freehill: Yes.

[fol. 195] By Mr. Freehill:

Q. From your examination of the time cards, will you state how many hours——

Mr. Sullivan: I object to that, your Honor.

The Commissioner: Wait till he finishes his question.

Q. (Continuing:) Will you state, from your examination of the time cards and your supervision of the work that was done here, exactly how many hours the painters were employed on the yacht "Drifter"?

Mr. Sullivan: I object to that. He has no such knowledge—he has sworn what relation he sustained—he knows nothing about what went on except as stated to him.

The Commissioner: You will have to prove by this witness only what he knows. The effect of that is another question, but you can't prove by him that the men did the work. You can prove that they reported that they did the work, that's all.

Q. Did you make up this bill, Mr. Bolen?

Mr. Sullivan: I object to that as improper.

The Commissioner: Objection overruled.

A. It was made up under my supervision.

Q. Did you verify the items of work and labor and services as stated on that bill, with the time cards and sheets in your office?

[fol. 196] Mr. Sullivan: We object to that as improper and incompetent, secondary evidence, not qualified to speak.

The Commissioner: Overruled.

A. I did at that time.

Q. Did you find that to be correct?

A. Yes.

Q. How much was the total charge for the repairs and materials furnished?

A. The total charge was $810.81.

Q. Was that paid?

A. Yes, sir.

Q. Was $1.50 the customary and usual rate for painters in New York City in October, 1925?

A. Yes.

Mr. Sullivan: If the Court please, I have stated my objections——

The Commissioner: You don't concede that?

Mr. Sullivan: Oh, no; I object to it, incompetent.

The Commissioner: I think the question is improper in form but the substance of it is material.

Q. What was the customary and usual rate for painters in New York City in October, 1925?

A. $1.50 an hour.

Q. For foreman painters?

A. $2.

Q. For coppersmiths?

A. I have forgotten.

Q. Well, refresh your memory (showing witness Exhibit 2).

A. $2 an hour.

Q. Electricians?

A. $2 an hour.

Q. Ship carpenters?

A. $1.50 an hour.

Q. Foreman ship carpenters?

A. $2.

Q. Laborers?

A. $1.

[fol. 197] Q. Pipe fitters?

A. $1.50.

Q. For the use of power saws per hour?

A. (Referring to exhibit) $1.50.

Q. Now, the tugboat charges to and from Port Newark and Port Morris?

A. $150.

Q. The survey charge?
A. $26.
Q. Hauling and launching?
A. $35 for hauling and $30 for lay days.
Q. Expenses $8—can you state what that was for?
A. I don't remember just what that was for now. I think it was the men's expenses that went over the boat.
Q. Over to Port Newark?
A. Port Newark, yes.
Q. At the time the damage was——
A. At the time, yes.
Q. Were these time cards made by the employees, made in the regular course of business?
A. Yes.
Q. And required by the company?
A. Yes, sir.
Q. I think you testified that before this bill was made up, you made examination of those time cards?
A. The items were checked off and verified.
Q. And did you give the orders for this work to be done?
A. Yes.
Q. When?
A. About that date. I can't give the exact date—around October, 1925.
Q. Was that after Mr. Jolly made his survey——
A. Yes.
Q. (Continuing:) and conferred with Mr. Christen of your company?
A. Mr. Christen, yes, sir.
Q. What is his position with your company?
A. He is the superintendent.

Cross-examination.

By Mr. Sullivan:

Q. When was it you employed the libellant to tow the "Drifter" down to Port Newark, what date was that?
A. I don't remember the day.
[fol. 198] Q. Will this help you any (showing witness Libellant's Exhibit 2)?
A. No, the arrangement was made for the towing——
Q. I am speaking of the date——

A. (Referring to the exhibit) This is dated November 19th, but that isn't the date the boat was towed over—October 20th.

Q. Did you make the arrangements with Simpson to tow the boat down?

A. No, sir, I did not.

Mr. Freehill: I object to that. That was already testified to in handling the other suit for contract.

Q. Did this matter come through you as treasurer of the Consolidated Shipbuilding Company?

A. The bill, yes.

Q. When was it you say that the Consolidated Shipbuilding Corporation employed Alexander Simpson to do this work?

A. I don't know the date. It was several days before the work was done.

Q. Can you look at that—will that help you?

A. No, that doesn't tell me when it was arranged.

Mr. Freehill: It was arranged on October 19th?

The Witness: Several days before.

Mr. Freehill: October 19th it left Port Morris and the contract was made the 13th, I think, wasn't it?

Q. Did the check go through your hands to pay Simpson for towing this "Drifter"?

A. Yes. It went through the office.

Q. And it was paid?

A. Yes, sir.

[fol. 199] Q. The check was made payable to Alexander Simpson?

A. Yes, sir.

Q. And it's Libellant's Exhibit 4 here?

A. Yes.

Q. Have you the contract of the owner with the man who had the "Drifter" built; have you got the contract with you?

A. No, sir.

Q. Where is that contract?

A. I don't know. I have been trying to find it. Some of the lawyers have it. I don't know whether you have it or the Court has it. We had it in Court in Harlem and——

Q. Why do you say I might have had it? Did you ever deliver me any——

A. There was a call for it in that Court.

Q. Did you ever deliver such a contract to me?

Mr. Freehill: I object to that. This is immaterial.

The Commissioner: I don't think this is material.

Q. Well, what was the name of the man that had the "Drifter" built?

A. Mr. Frost, T. C. Frost.

Q. And have you looked for the contract between you or the Consolidated Shipbuilding Corporation and Frost?

A. Yes.

Q. When?

A. Well, about a month ago.

Q. About a month ago?

A. Yes.

Q. When did yo- last see it?

A. Last saw it in Court in 125th Street, two or three years ago.

Q. You haven't seen it since?

A. No, sir.

Q. Do you mean to tell the Court here that it's lost?

Mr. Freehill: Oh, I object to it as immaterial.

[fol. 200] The Commissioner: Is this the contract for building the boat?

Mr. Sullivan: The contract for building the boat?

The Commissioner: How is that material on this question of damages?

Mr. Sullivan: It's not—your Honor, I am making him my own witness. I have a right to make him my own witness.

The Commissioner: Your own witness as to any material to be proved before me. I don't see how that contract is material.

Discussion off the record.

Adjourned without date.

Met pursuant to adjournment, at the office of the Commissioner, John L. Galey, Esq., No. 27 William Street, New York City, October 22, 1929.

Present: Mr. Galey, Mr. Freehill and Mr. Sullivan.

WILLIAM J. BOLEN recalled.

By Mr. Freehill:

Q. I show you this document and ask you to state what that is.

A. (Referring to document) That is the specification of hull 2520 built for Mr. Frost and called the "Drifter".

Q. Is that the "Drifter" involved in this matter?

A. Yes, sir.

Mr. Freehill: Mark it in evidence.

[fol. 201] Mr. Sullivan: I don't see any materiality of it. I don't know why they do that. It's no part of the case. I desire to be advised by the Commissioner.

The Commissioner: I will take it for what it's worth.

The specification is marked Libellant's Exhibit 5.

Q. I show you this paper and ask you to state what that is (showing witness paper).

A. That is the blueprint of hull 2820 called the "Drifter".

Mr. Freehill: Mark that in evidence.

It is marked Libellant's Exhibit 6.

Mr. Sullivan: If the Court can see any use of it?

The Commissioner: Well, I think that follows the same line as the other.

Q. Is this the order you received from Mr. Frost for the repairs to be done?

A. Yes.

Mr. Freehill: I want that in evidence.

Mr. Sullivan: Well, I will have to look at that (referring to it). Well, I will submit it to the discretion of the Court.

The Commissioner: I will take it.

The order is marked Libellant's Exhibit 7.

Q. Mr. Bolen, have you made a search of your records for all of the time cards involved in this job?

A. Yes, sir, I have.

Q. Have you found them?

A. I have found some of them but not all of them.

Q. Have you produced those that you have found?
A. No.
[fol. 202] Q. Where are they?
A. In the office.
Q. Will you produce those?
A. Yes.
Q. What has happened to the balance of the time cards that you haven't produced?
A. I don't know. We had them all at Court——
Q. You refer to what Court?
A. The Court in Harlem, where the case was tried.
Q. You mean the Municipal Court?
A. Municipal Court, First District.
Q. Seventh District.
A. Seventh District.
Q. In this action?
A. Called for in this action.
Q. Stevens against Simpson?
A. Yes, sir.
Q. After that production in Court, what happened to those time cards that are now missing?
A. I couldn't say.
Q. Did you have them here in Court?
A. Yes, sir.

Mr. Freehill: Have you any objection to offering in evidence your notice to produce?

Mr. Sullivan: I can't see any relevancy of it. It's not a part of your case, as I view it.

Mr. Freehill: Well, will you concede a notice to produce was served wherein you stated that you want "all other documents, notes, papers, letters and writings whatsoever in your possession or control containing any entry, memorandum or other matter in any way relating to the above cause" was served upon Neil P. Cullom as attorney for William Stevens?

Mr. Sullivan: I don't see how it's material here.

The Commissioner: I don't think it's material here.

[fol. 203] Mr. Freehill: I will call, if you are not satisfied, the superintendent of the yard.

The Commissioner: I think you had better call some one to show the repairs.

Mr. Sullivan: Subject to that, do you now rest?

Mr. Freehill: Yes.

Mr. Sullivan: Mr. Commissioner, I have in my hands the stenographer's minutes of the trial of the action entitled Municipal Court of the City of New York, Borough of Manhattan, Seventh District, Part I, William Stevens, Plaintiff, against Alexander Simpson, Herbert Simpson and William A. Rhodes, Defendants, Index No. 8,891—1926. These minutes were taken of the trial. I have notified my opponent in this proceeding that I would——

Mr. Freehill: I can say to this I won't object to their not being true copies of the minutes, if that's what you mean——

Mr. Sullivan: I submit them to you for the purpose of showing our evidence with respect to the extent of the damage to the "Drifter" referred to and testified to by the witnesses in this proceeding. Will it be considered that these are correct transcripts of the minutes of the trial referred to?

Mr. Freehill: No objection on the ground that they are not true transcripts. I will concede that what you have there is a true copy of the testimony of William Rhodes, Alexander Simpson and Herbert Simpson given on that trial.

Mr. Sullivan: Now, if the Court please, I beg to omit fur- [fol. 204] ther reference to these minutes at this point, and call Mr. Herbert Simpson to show the death of Mr. William Rhodes, one of the witnesses who testified and who died long before today. May I do so?

The Commissioner: Yes.

Mr. Freehill: I will concede that Rhodes is dead.

Herbert Simpson, being duly sworn and examined as a witness, testified as follows:

By Mr. Sullivan:

Q. Did you know William Rhodes referred to in this proceeding and in the proceeding I just referred to?

A. Yes.

Q. Was he related to you?

A. Yes, sir.

Q. What relation?

A. Brother-in-law.

Q. Were you present at the trial of the action that I have just stated?

A. Yes, sir.

Q. Were you a witness there?

A. Yes, sir.

Q. When did William Rhodes die?

A. December 4, 1927.

Q. And your sister was appointed administratrix of his estate by the Surrogate's Court of the County of New York?

A. Yes, sir.

Q. Were you present when William A. Rhodes testified as given in the minutes I referred to?

A. Yes, sir.

Mr. Freehill: I object to it as incompetent and immaterial.

Mr. Sullivan: He just testified that he was present. (To [fol. 205] the Commissioner:) Now, those are all the questions I desire to ask Mr. Simpson.

The Commissioner: No cross examination?

Mr. Freehill: No, not on that point.

Mr. Sullivan: If the Commissioner please, all these questions are not on the question of damage. There are a few questions preliminary, leading up to the testimony about the damage to this "Drifter", the same damage referred to in this proceeding before you. I therefore beg leave to read the testimony of William Rhodes, deceased——

Mr. Freehill: Now wait a minute. I object to——

Mr. Sullivan: Why not let me state it? I won't ask a single question until you are ready——

Mr. Freehill: You now made an offer——

Mr. Sullivan: No, no, I am not offering it.

The Commissioner: You can't read it without offering it.

Mr. Sullivan: I am just identifying this paper.

Mr. Freehill: I will take your word for it that those are the minutes, if that's what you want.

Mr. Sullivan: Well, that accomplishes the purpose. At page 46 of the minutes referred to, William Rhodes referred to, testified as in these minutes recorded, is now dead, and died December 4, 1927——

The Commissioner: That's all been gone into. We are going over and over the same ground.

[fol. 206] Mr. Sullivan: I desire to read his testimony with respect to the extent and value of the damage to the "Drifter" referred to in this proceeding.

The Commissioner: Well, do you offer the testimony in evidence? If you want to read it, you had better offer it.

Mr. Sullivan: Yes.

The Commissioner: What portion of it?

Mr. Sullivan: Pages 46, 47, 48, 49.

Mr. Freehill: I object to the offer of the minutes of testimony of William Rhodes on pages 46 to 49, inclusive, in the action of Stevens against Simpson in the Municipal Court, upon the ground that it's incompetent, it not being a proceeding in this Court, it being an action in another court, and this same offer was made on the trial of this action before District Judge Woolsey and the minutes were excluded.

The Commissioner: Have you the minutes? Can you point out to me the place in the minutes where this testimony was offered?

Mr. Freehill: My man went into the Court, Mr. Galey, and he couldn't get those minutes. They couldn't locate the file, and Judge Woolsey's chambers were closed. I have no objection to their being read, subject to being stricken out.

The Commissioner: I shall follow the rule of Judge Woolsey with respect to admitting these minutes, but on the consent of proctor for the libellant, they may be read subject to his motion to strike out.

[fol. 207] Mr. Sullivan: Mr. Commissioner, I take exception to that part of your ruling where you say that you will follow the ruling of Mr. Justice Woolsey, and I respectfully submit that this is an independent proceeding and that under the law we are entitled to have that testimony admitted. The fact that Mr. Justice Woolsey may have ruled the other way does not bar its reception here. Just as a precaution, if you please—shall I read these to the stenographer?

The Commissioner: I think it would be better, if you can spare that paper, to have it marked as an exhibit subject to motion to strike out.

Pages 46, 47, 48 and 49 of the testimony referred to is marked Claimant's Exhibits A, B, C and D.

Adjourned to October 29, 1929, 2:30 p. m.

Further hearing at the office of the Commissioner, John L. Galey, Esq., No. 27 William Street, New York City, October 29, 1929.

Present: Mr. Galey, Mr. Freehill and Mr. Sullivan.

EDWARD ROBICHEAU, being duly sworn and examined as a witness for the libellant, testified as follows:

By Mr. Freehill:

Q. By whom are you employed?

A. Consolidated Shipbuilding.

[fol. 208] Q. Were you so employed in October, 1925?

A. I was.

Q. In what capacity?

A. As foreman of the ship carpenters.

Q. Will you state the nature of your work at that time?

A. You mean on this boat?

Q. You had to supervise——

A. Supervise the carpenter work.

Q. Did you do that in connection with the SS. "Drifter"?

A. I did.

Q. That's the boat involved in this case?

A. Yes.

Q. I show you these time cards and ask you to state what they are (showing cards to witness).

Mr. Sullivan: Well, just a moment. I object to that as improper and incompetent. If the cards have any relation with the subject matter, they will speak for themselves.

The Commissioner: Objection overruled.

Mr. Sullivan: Exception.

Q. (Continuing:) State what they are.

A. They are labor put on this "Drifter" to repair the boat.

Q. That's the labor——

A. On the ship carpenter's part of the job.

Q. Is that your signature, Mr. Robicheau?

A. It is.

Q. On each of those cards? Examine them, please.

Witness examines them as requested.

Mr. Freehill: I offer them in evidence.
Mr. Sullivan: I would like to examine him on them.
Mr. Freehill: Go ahead (handing cards to Mr. Sullivan).

[fol. 209] By Mr. Sullivan:

Q. When did you last see these cards?
A. Just—just now is the last time I seen them.
Q. When did you see them before that?
A. At the time I signed them.
Q. Just how did you sign them? Can you tell me without looking at the cards?

Mr. Freehill: Well, I object to that. Let him look at the cards. In ink or in pencil do you mean?
Mr. Sullivan: No, please don't interrupt.
Mr. Freehill: I object to this as cross examination. I have not finished my direct.
The Commissioner: Well, he is asking the question of the witness as preliminary to an objection, I believe.

A. Well, what's meant by that?

Mr. Sullivan: Well, just read the question.
The Commissioner: I don't think the question is clear.
Mr. Sullivan: Well, would your Honor permit me to have it read?
The Commissioner: Yes.

Question read.

The Commissioner: I think he has answered the question. I don't know what you mean myself.
Mr. Sullivan: I take exception to your Honor's observation that you don't know what I mean.

[fol. 210] Q. Well, did you sign these cards?
A. I did.
Q. How?
A. With a pencil.
Q. Black or blue pencil?
A. Black pencil.

Mr. Freehill: It's immaterial.

Q. How did you sign them—what did you write when you signed them?

Mr. Freehill: I object to that——

The Commissioner: This is not properly preliminary to any objection to the papers themselves. This is more properly a part of your cross examination. If you want to ask him any questions on which to base an objection to those papers, that's permissible. Otherwise you will have to——

Mr. Sullivan: That's what I am doing.

The Commissioner: I don't think your questions have that application.

Mr. Sullivan: I take exception to your Honor's drawing a conclusion at this time.

The Commissioner: Well, an objection has been made to this line of questioning and I shall sustain the objection at this time unless you want to ask him questions properly preliminary to some objection to the papers themselves.

Q. Did you sign these all at once?

Mr. Freehill: I object to that as immaterial.

The Commissioner: It is not immaterial but it is improper at this time.

[fol. 211] Q. Is all the lead pencil on these slips in your handwriting?

A. No.

Q. What part of each of these slips is in your handwriting?

A. The signature.

Q. What does your signature consist of?

A. Two initials, E. R.

Q. And that E. R. is at the foot of the slip?

A. Yes.

Q. Do you know who put the other lead pencil writing on these slips?

A. Well, I——

Q. Did you see anybody do it?

A. No.

Q. Did you hand the slips in to somebody after you initialed them?

A. They are taken down to the timekeeper's office.

Q. You hand them to the timekeeper?

A. Yes.

Q. And have you seen these slips since that time?

A. No.

Q. How many of these slips are there? Will you count them—I know, of course, but I want it on the record.

A. Thirteen I count.

Q. Can you tell me without looking at the slips what date- they refer to?

A. No.

Q. Will you inspect the slips and tell me what dates they refer to?

A. (Referring to the slips.) That's October the 22nd——

Mr. Freehill: I think they speak for themselves.

A. (Continuing:) They speak for themselves anyway.

Q. The Referee passes on that. Will you answer my question.

Mr. Freehill: I object to that.

[fol. 212] The Commissioner: I don't think it is necessary to put that into the record. He is simply reading the dates off the slips.. Objection sustained.

Q. Can you tell me the different dates that these slips refer to?

A. No.

Q. Have you any independent recollection as to how many dates they refer to?

A. No.

Mr. Freehill: You mean apart from reading the slips?

Mr. Sullivan: He answered my question. There is no question before the Court.

Q. Can you tell me without looking at these slips how many different dates the slips refer to?

The Commissioner: You have already asked him that question.

Mr. Sullivan: Well, he said no. May I have his answer "No"? Mr. Referee, I ask that they be marked for identification.

Mr. Freehill: I offer them in evidence.

The Commissioner: They are accepted in evidence.

Mr. Sullivan: We object to their reception in evidence on the ground that they are not competent. The contents have not been proven. What they refer to has not been identified and that the testimony of the witness shows it's hearsay testimony. In that respect I refer to his testimony

where he said he signed them by initialing each of these cards and handed the slip to the treasurer and the treasurer [fol. 213] wrote all that's on these several slips in lead pencil.

The Commissioner: I don't think he said that.

Mr. Sullivan: Well, may I ask that the stenographer verify——

The Commissioner: Ask him the question.

Mr. Freehill: I think it's just wasting time. I would like to conserve your time——

Mr. Sullivan: Would your Honor permit the record to be read? I don't want to go over that again.

The Commissioner: What do you want read?

Mr. Sullivan: Where I asked him if all the writing in lead pencil on these cards is in his handwriting. He said, "No." I asked him what was. He said the initial at the bottom and that the other was in handwriting—he didn't know whose.

The Commissioner: It's not necessary to have that read. That was what he testified, as I recall.

Mr. Sullivan: Then I just want to call it to your Honor's attention, so that I make clear the basis of my objection. Do I understand that your Honor ruled that they be accepted?

By the Commissioner:

Q. Did you sign these slips after the writing in the body of the slip had been put on the slip?

A. Yes, sir.

[fol. 214] Mr. Sullivan: I object to that question as leading and improper.

The Commissioner: Objection overruled.

Mr. Sullivan: Exception.

The thirteen slips dated from October 21, 1925 to October 24, 1925, inclusive, are marked Libellant's Exhibit 1 of this date.

Mr. Freehill: There is one for October 21; for October 22nd there are three; for October 23rd there is five and for October 24th there are four.

The slips are marked Libellant's Exhibit 1-a to 1-m, inclusive.

By Mr. Freehill:

Q. I show you eleven slips bearing your name and ask you to state what they cover?

Mr. Sullivan: I object to that as improper and incompetent, calling for a conclusion. The papers speak for themselves.

The Commissioner: Objection overruled.

Q. (Continuing:) What do they call for?

A. They call for the material used in repairing the "Drifter" from my department.

Q. That's the carpenter work?

A. Carpenter department.

Mr. Freehill: I offer those in evidence.

Mr. Sullivan: We object to that as improper, incompetent.

The Commissioner: Well, I don't think they have been properly proved for admission in evidence.

[fol. 215] Q. Is that your signature?

A. This—yes.

Mr. Sullivan: He has already testified to that—what's the use of going over that?

Mr. Freehill: I will explain how these cards are made up.

Mr. Sullivan: We object.

The Commissioner: The objection is overruled.

Q. Will you explain how these material cards are made up?

A. Well, a man that's working on the job—he comes into my office. If I ain't there he gets the timekeeper to make him the material card to get the material out of the storeroom.

Q. For repairing the vessel?

A. Repairing the boat, yes.

Q. And that material that's referred to in those material cards—was that used in the "Drifter"?

Mr. Sullivan: I object to that as leading.

The Commissioner: Objection overruled.

Mr. Sullivan: Exception.

A. Yes.

By the Commissioner:

Q. Do you know yourself that that went into the "Drifter"?

A. Yes, your Honor, I do.

Mr. Freehill: I offer them in evidence.

Q. Why do you sign the cards?

A. I have to sign them to get the material out of the storeroom.

[fol. 216] By Mr. Freehill:

Q. Is that the usual course of business——

Mr. Sullivan: I object to the question "the usual course of business" as improper and incompetent.

By the Commissioner:

Q. Do you personally know that all that material mentioned on those cards went into the repairs?

Mr. Sullivan: I object to the Court's question as leading, improper and calling for a conclusion; it already appears that he did not have personal knowledge of them.

The Commissioner: That's what I want to find out. If he hasn't personal knowledge, he didn't say so.

Q. (Continuing:) Can you answer that question, Mr. Witness?

Mr. Sullivan: Does your Honor overrule my objection?

The Commissioner: Yes.

A. This material must have been used on that——

Mr. Sullivan: If you please, I move to strike the answer out.

The Commissioner: Let him finish the answer.

Q. Is that your best answer to the question?

[fol. 217] Question read.

A. Yes.

Mr. Freehill: I offer those in evidence.

Mr. Sullivan: We object to that as improper and incom-

petent, not identified with the subject matter. It appears that the witness has no personal knowledge.

The material cards are marked Libellant's Exhibits 2a to 2k, inclusive.

By Mr. Freehill:

Q. Mr. Robicheau, are you familiar with the type of boat this "Drifter" was (showing witness blueprint)?

A. Yes.

Mr. Sullivan: Your Honor, I desire to object. When we adjourned the last time, my recollection was that the libellant had closed, with the exception of adding testimony——

Mr. Freehill: I am not going to bring any more testimony than what I said I was.

Mr. Sullivan: Then what's your understanding of the last adjournment?

The Commissioner: Well, I won't limit him. If he has witnesses here who can contribute to the proof I won't limit him because he said that he closed his case.

Q. Your answer is yes?

A. Yes.

Q. I show you Libellant's Exhibit 6 and ask you to state whether or not that represents the plan of that yacht "Drifter"?

[fol. 218] Mr. Sullivan: If the Court please, we have been over that. There doesn't seem to be any dispute about it.

Mr. Freehill: All right, I withdraw it.

Q. It has been testified here that the damage to the starboard——

Mr. Sullivan: I object to the question as far as he has gone. He can't lead the witness like that.

The Commissioner: Well, he hasn't finished the question.

Mr. Freehill: I withdraw the question.

Q. How many years have you been in the shipbuilding business?

A. About 28—28 years.

Q. During that time have you been constantly engaged in doing ship carpenter work?

Mr. Sullivan: If the Court please, I object to that as leading. Every question my friend asks is leading——

Mr. Freehill: I will withdraw it then.

Q. What has been the nature of your work during those 26 years?

A. Why, ship carpenter's.

Q. Working on what type of vessels?

A. Mostly yachts.

Q. Did you build this yacht "Drifter"?

A. I did. I was foreman of the ship carpenter's work.

Q. Under your supervision?

A. Yes.

Q. You attended to the construction?

A. To the construction.

Q. It has been testified——

[fol. 219] Mr. Sullivan: I object to the form of the question—what's been testified here. It's——

The Commissioner: The question hasn't been finished.

Mr. Freehill: I will withdraw it.

Q. Assuming that a boat constructed as the yacht "Drifter" had a hole in the starboard side amidships just above the water line, or at the water line, and there were four planks broken and flagpole and socket were broken, a band on stem broken, the boat was drydocked, machinery was removed in order to enable the boat to be repaired—the boat to be repainted, will you state, in your opinion, if the item of carpenter work——

Mr. Sullivan: If you please, I object to counsel showing him a paper while he is asking him a question.

The Commissioner: Don't show him the paper.

Q. (Continuing:) Would you state that 94 hours would be reasonable and necessary to repair that boat in first-class condition?

Mr. Sullivan: Just a moment.

The Commissioner: I think that question is leading.

Mr. Sullivan: There is no basis for that kind of question.

The Commissioner: Do you object to it?

Mr. Sullivan: Yes, sir, I object to it.

The Commissioner: Sustained—the objection to that question is sustained.

[fol. 220] Q. Assuming that state of facts which I have just mentioned in the foregoing question, will you state in your opinion what would be necessary of ship carpenter's work to put that boat in condition in which it was before the accident?

Mr. Sullivan: Same objection.

The Commissioner: Objection overruled.

Q. (Continuing:) Will you state the number of hours?

Mr. Sullivan: If the Court please, he is submitting that paper so that all he has got to do is look down on it.

The Commissioner: I don't think it's fair to hold the paper in front of the witness.

Q. (Continuing:) Do you wish to refresh your memory?

Mr. Sullivan: How can an expert refresh his memory?

Mr. Freehill: He was on the job here.

Mr. Sullivan: I object to it as incompetent, irrelevant, not qualified to speak.

The Commissioner: I sustain that objection.

Q. Will you state approximately how many hours of carpenter work would be necessary to put that boat in first-class condition?

A. I can't do that.

Q. Would you say it would be 100 hours?

A. I don't know.

[fol. 221] Mr. Sullivan: I object to that. He has already answered the question. He stated he couldn't answer.

The Commissioner: He has already answered.

Q. It has been testified that——

Mr. Sullivan: If the Court please, we have been over that.

The Commissioner: The question hasn't been asked yet. Wait till the question is asked.

Q. It has been testified that the number of hours of carpenters' work on this boat was 94 hours. Will you state if that was reasonable and necessary to put that boat in the same condition in which it was before the accident?

Mr. Sullivan: If the Court please, I object to that as improper and incompetent——

The Commissioner: I don't think that's a proper question if you are examining him as an expert and as to the amount of time required for that kind of repairs.

Q. Will you state whether or not $148——

Mr. Sullivan: If you please—I think I am justified in objecting——

The Commissioner: I don't think it's proper to suggest to the witness the answer by a leading question and then correct the question by a proper one which calls for the answer you have already indicated.

[fol. 222] Q. What would you say would be the fair and reasonable cost of doing the ship carpenter work on that vessel after the damage occurred?

Mr. Sullivan: I object to that——

The Commissioner: I overrule that objection.

Mr. Sullivan: I will ask your Honor to let me state my objection. I object to it on the ground that he is not shown to qualify to speak. He is now speaking as an expert and he swore he didn't know anything about it.

Mr. Freehill: He is 26 years in the business.

Mr. Sullivan: He hasn't indicated to your Honor any basis for that kind of an answer. It's simply a leading question.

The Commissioner: He hasn't been examined as to his knowledge of charges for carpenter work. I don't know whether he has any knowledge of that or not.

Mr. Sullivan: Your Honor, he hasn't shown by this witness what was actually necessary to be done. They haven't shown here any basis for that.

The Commissioner: Well, can't you show that? Does this witness know anything about that? That's something that I must say I should like to be enlightened about. I don't think that Mr. Jolly's testimony was conclusive on that point. I don't know whether—I assume that this witness being the carpenter in charge of the job could testify as to the amount of work required. You are not examining him on that point?

[fol. 223] Mr. Freehill: Only on the carpenter work. I am asking him what would be the fair and reasonable value of the carpenter work.

The Commissioner: Well, you are asking him about the value but I think you will first have to establish the amount.

Mr. Sullivan: What work was necessary in consequence of that damage? What was the amount of work?

Mr. Freehill: He has testified on these cards it was 94 hours.

By the Commissioner:

Q. Do you have any knowledge, Mr. Witness, as to the charges made for carpenter work on an hourly basis by shipwrights?

A. No, your Honor, I don't.

Q. Or repair yards at the time these repairs were made?

A. No, your Honor, I don't.

The Commissioner: I don't think you can ask him about amounts.

By Mr. Freehill:

Q. Will you state how many hours of carpenter work was done on the yacht "Drifter" in this instance?

Mr. Sullivan: If the Court please, I object to that.

The Commissioner: I will permit him to answer if he knows.

Question read.

Mr. Sullivan: If the Court please, I object to that as improper, incompetent.

[fol. 224] The Commissioner: I have already ruled on the objection.

Mr. Sullivan: Exception.

Q. Will you state the number of hours?

A. I can't, no.

Q. Did you know then at that time how many hours——

A. No.

Q. I ask you to state whether or not you need your memory refreshed——

Mr. Sullivan: If your Honor please, he said he didn't know then, he didn't know now—nothing to refresh.

The Commissioner: I am afraid he foreclosed himself.

Q. Do I understand you to say that you did not know at the time this job was done how many hours of carpenter work were spent on this "Drifter"?

A. Not the total amount of hours, no.

Q. Assuming that a boat of the type of the yacht "Drifter" just built had a hole in the starboard side amidships above the water line, that four planks were broken and flagpole and socket were broken, that a band in the stem was broken; will you state what work would be necessary in order to put that boat in the same condition in which it was before the damage?

Mr. Sullivan: We have been over that, your Honor. I object to that as improper, incompetent.

The Commissioner: Objection overruled.

Mr. Sullivan: Your Honor, there is not basis here, nothing definite so that we could apply his mind to give an an-
[fol. 225] swer. Here are four planks broken. How, to what extent—I object to it as the question does not assume a state of facts proven in this case.

The Commissioner: You can cross examine him about it and I will allow the answer.

Q. Do you wish the question repeated?

Mr. Sullivan: The Court has given me the privilege at this point to cross examine——

The Commissioner: No, I don't mean that you can cross examine now but in your cross examination you can deal with this.

A. I can answer that for the ship carpenter department only.

Q. All right.

A. Removal of the planks and the outside plank and inside plank if they are broken, and a lot of machinery removed inside and tanks, if it comes in the way of the repair, and put them back again, fasten them with copper rivets, intermediates fastening or brass screws and the intermediate fastening must be put in from the inside and the rivets got to be riveted from the inside of the boat, and then if everything that's in the way of the repair has got to be removed, in the way of machinery—tanks and whatever come in in that particular place.

Q. Would the planks——

Mr. Sullivan: I move to strike out the answer as not responsive—a good part of it. If this and if that—that wasn't in the question at all.

[fol. 226] The Commissioner: No, I will allow the answer to stand as it is.

Mr. Sullivan: I will take an exception.

Q. Would the planks have to be renewed at the butt?

A. Yes, to put the boat back in the way she was.

Q. Will you look at this plan marked Libellant's Exhibit 6 and state at the amidship just above the water line, starboard side, what machinery would have to be taken out (showing witness plan)?

A. That plan doesn't show all the machinery in that boat.

Q. What machinery was put in that boat, to the best of your recollection, at the point where I have indicated?

A. I don't remember where the damaged plank was.

Q. Assuming it was at the starboard side amidships, just above the water line or at the water line on this boat, what machinery would have to be removed to get at the planks?

A. I don't remember what machinery it was in there, but I imagine it was a generator on the side.

Q. Was the generator on the starboard side?

A. I believe it was.

Q. And did that have to be taken out in order to put the planks in?

A. Yes.

Q. Do you recall any other machinery that was at that place?

A. No.

Q. Now, will you state what materials would be necessary in the way of carpenters' material to repair that boat?

Mr. Freehill: I withdraw that. I think it's confusing——

Mr. Sullivan: I object to that.

[fol. 227] The Commissioner: Have you finished your question?

Mr. Freehill: No, I haven't.

Q. (Continuing:) Will you state what materials would be used to do the ship carpenter work on that boat in that type of damage?

Mr. Sullivan: That's the same question.

The Commissioner: No, I will allow that.

Mr. Sullivan: I object to that as improper and incompetent. It hasn't been shown what was necessary to repair the small indentation in the side of the boat.

The Commissioner: The question is overruled.

Mr. Sullivan: Exception.

Q. (Continuing:) Will you state now what materials would be necessary. Do you wish to refresh your memory from any paper in order to testify——

Mr. Sullivan: Now, if the Court please, I object to that——

Mr. Freehill: He has a right to refresh his memory.

The Commissioner: Are you asking him about a fact or are you questioning him as an expert?

Mr. Freehill: I am asking him both as an expert and on the facts.

The Commissioner: I think your question was directed to him as an expert and, if so, he can't refresh his memory from papers which would indicate——

[fol. 228] Q. Will you state what, in your opinion, are the materials that would be necessary to repair that type of damage?

Mr. Sullivan: If you please, your Honor has ruled on that——

The Court: No, it's overruled.

Q. Do you understand the question, Mr. Robicheau?

Question read.

A. The amount of material necessary to repair that boat?

Q. And the character of the material?

A. Why, the material, the planking was cedar, if I recollect.

Q. Cedar?

A. I believe it was. I don't remember exactly what kind of material that was used all the way through; the planking was cedar——

By the Commissioner:

Q. I want to ask you this question, Mr. Witness: Before you signed these requisitions for material which have been

put in evidence, did you satisfy yourself that those materials were necessary in effecting that repair job?

Mr. Sullivan: I object to that——

A. Yes, sir.
Q. Did you do that personally?
A. Yes, sir.

Mr. Sullivan: I object to your Honor's question as leading and calling for a conclusion and improper, whether he was satisfied or not is not an issue in this case, and it's improper.

[fol. 229] Q. Were those materials necessary for the job?
A. Yes.

Mr. Sullivan: Your Honor, I desire to object to that. Will your Honor rule on my objection.

The Commissioner: Yes. Do you want to strike out my question?

Mr. Sullivan: Yes.

The Commissioner: Well, I deny the motion.

Mr. Sullivan: Well, then I ask your Honor to sustain my objection.

The Commissioner: I overrule the objection.

Cross-examination.

By Mr. Sullivan:

Q. Mr. Robicheau, the following questions will be addressed to you in reference to Libellant's Exhibit 1, October 29, 1929, known as Exhibit 1, consisting of 13 slips. Where did you first see these slips?
A. When I signed them.
Q. That was in the Consolidated boat works factory?
A. Yes.
Q. Where did you get them?
A. On my desk.
Q. Well, let us get the whole of it. Were the blanks left on your desk?
A. No.
Q. Well, these blanks were in the custody and care of what department before they came to you?
A. The timekeeper's department.

Q. How would you get these?
A. Why, I sent a man after them.
Q. To the timekeeping department, is that right?
A. Yes.
[fol. 230] Q. And when he brought them to you, were they in blank or did they have writing on them?
A. In blank.

By the Commissioner:

Q. You mean the signature was in blank or the body of the slip was blank—no writing on it at all?
A. No writing on it at all.

By Mr. Sullivan:

Q. These cards at the head have what they call "Time card" printed on them (showing them to witness)?
A. Yes.
Q. And then there is a calendar of the days of the month printed on it, is that right?
A. Yes.
Q. On each one, is that right?
A. That's right.
Q. Do you know why the calendar of the days of the month is printed on there?
A. No.
Q. Well, you have seen a great many of these time cards?
A. I have.
Q. Did you ever ask why the calendar of the days and month were printed——
A. No.
Q. Were they printed on there for you to punch the days that the work was done by you?
A. I don't know.
Q. Did you ever ask?
A. No.
Q. Will you read into the record here just what was on these slips when they came to you?
A. The blanks you mean?
Q. No, just read it "Time card".
A. Time card.
Q. I suppose the only thing that was on them was what is printed there, is that it?
A. What's printed.

Q. And then there is some print on each of these cards?
A. Print.
[fol. 231] Q. There is print and lead pencil writing?
A. Yes.
Q. And the stamp?
A. Yes.
Q. Now, the only thing on these slips consists of the printed part of the time card and some writing in lead pencil—in black lead pencil, some writing in blue lead pencil, there is a red stamp, there is some figures and writing on the card, apparently impressed by a red stamp?
A. Yes.
Q. And you say, as I understand, that the only thing that you put on any of these cards was the lead pencil initial at the bottom of the face of the card?
A. Yes.
Q. Just what is this endorsement you put on the foot?
A. E. R.
Q. E. R.—that's in black lead pencil?
A. Yes.
Q. Will you inspect these cards—just look at them (showing them to witness).

Witness does as requested.

Q. They are apparently all clean and no——

Mr. Freehill: They are all filled in—these cards.

Q. (Continuing:) I say they are apparently all clean, aren't they?
A. Yes.
Q. They are apparently just as clean as though they were made up today, aren't they?

Mr. Freehill: Oh, I object to this.
The Commissioner: The cleanness of the cards appears from the cards themselves. That's argumentative.

[fol. 232] Q. Any of these cards couldn't be any cleaner if they were made today, could they?

Mr. Freehill: I object to that.
The Commissioner: Objection sustained.
Mr. Sullivan: I take excepton, your Honor.

Q. Did you keep these cards since you put your initials on them?

A. No.

Q. After you put your initials on them, they went to the time department?

A. Yes.

Q. And you hadn't seen them since?

A. No.

Q. Do you know if all this lead pencil writing on the face of Libellant's Exhibit 1, consisting of 13 slips, was put on by one man or more than one man (showing witness cards)?

A. Which one?

Q. All the black lead pencil writing on that card—do you know whether or not it was placed there by one man?

A. I don't know.

Q. All right, let me have them.

The witness returns the cards.

Q. On inspection would you say that the lead pencil writing on that card was placed there by at least three different people? I now refer to this writing up here, this writing and this writing (showing it to witness)?

A. I don't know.

Q. Where were you when you put your initials on these Libellant's Exhibit 1?

A. In my office.

Q. Are you sure you were in your office?

A. Yes.

Mr. Freehill: I think it's immaterial.

[fol. 233] Q. Do you always put these initials on these slips in your office?

A. Yes.

Q. Who asked you to place your initials on these slips?

A. They have to be signed by me before they go down to the timekeeper's office.

Q. Who asked you to sign them?

A. I don't remember.

Q. Can you tell without looking at these slips how many of these cards refer to repairing hole in side?

A. No.

Q. Will you examine these slips and see how many refer to repairing hole in side (showing witness slips).

A. Eleven.

Q. Eleven of the slips contain on their face the words "repairing hole on side"?

Mr. Freehill: It's conceded. I object to it as the paper speaks for itself.

A. Eleven.
Q. Describe the hole on the side.
A. Describe the hole on the side?
Q. Yes.
A. I can't do it.
Q. Why can't you?
A. I don't remember.

Mr. Freehill: I object to it.
The Commissioner: I sustain the objection.
Mr. Sullivan: Exception.

By the Commissioner:

Q. Did you do more than one job in repairing the "Drifter" or was there only one job after she left your yard on the 19th of October, 1925?

Mr. Sullivan: If the Court please, I object to your Honor's question. That destroys the only basis we have——

[fol. 234] The Commissioner: This is not a trial before a jury. Go ahead with your cross examination.

By Mr. Sullivan:

Q. Did you ever see this part of this "Drifter" that you refer to as the hole on these slips?
A. Yes.
Q. When?
A. That was in 1925, I believe.
Q. Well now, give us your best recollection of what you would call the hole that you refer to in these slips, Libellant's Exhibit 1, consisting of 13 slips?
A. Well, I believe it was a hole on the starboard side I remember; how bad it was I don't remember.
Q. Well, give us your best recollection?
A. Hole on the starboard side about the water line and some planks broke, that's all I remember.
Q. You refer in your slips to repairing hole on the side?
A. Yes.

Mr. Freehill: He testified that.

Q. And at the foot of each of these slips your initials are; now, that hole that you refer to on these slips, confining your attention to that—will you give us now the best recollection you had.

The Commissioner: He has already answered that question.

Mr. Sullivan: No, no, "your best recollection".

The Commissioner: He has given his best recollection.

Q. Can you give me anything further?

A. I cannot.

Q. What is the best you can do——

[fol. 235] The Commissioner: He has already answered that question.

Mr. Sullivan: I haven't heard his answer, your Honor. Would your Honor permit me to ask him again if his mind is any further refreshed so that he can give any recollection with respect to the hole referred to in Libellant's Exhibit 1?

The Commissioner: You mean any recollection beyond what he has already given?

Mr. Sullivan: Yes.

The Commissioner: All right.

The Witness: No.

Q. Now, state what you——

The Commissioner: I will not permit the repeating of this question time after time. You are wasting a great deal of time here on this cross examination and you have got to get forward.

Mr. Sullivan: I take exception to your Honor's statement that we are wasting time. Would your Honor permit the stenographer to read his answer that your Honor recollects his giving in testimony as to that thing he refers to as a hole?

The Commissioner: Yes.

Previous answers of the witness read.

Q. Just how were these planks broken?

A. I don't remember that.

Q. Did you make any memoranda in writing?

A. No.

Q. Well now, all these cards, Libellant's Exhibit 1, consisting of 13 slips, simply refer to time?

A. Yes.

[fol. 236] Q. Where was the boat being repaired?

A. Consolidated Shipbuilding.

Q. I just didn't catch what you said.

Mr. Freehill: Consolidated Shipbuilding Company.

Q. Oh, what part, what part? Where was the boat being repaired—where was the boat physically located when it was being repaired?

A. Why, it was hauled out on the railway in what we call No. 4 building.

Q. Did you do any of this work yourself?

A. No.

Q. How did you get the information—where—from whom did you get the information with respect to the time; who told you about that?

A. I don't——

Q. You have got time here—hours so much, hours this and hours that—this is a time card, isn't it?

A. Yes.

Q. Where did you get these times written on these cards? Who gave it to you?

A. Why, the man that makes the card gave me the card——

Q. And the time was on it?

A. Yes.

Q. And it was on there when you signed it?

A. Yes.

Q. And you didn't put the time on?

A. No.

Q. What is the name of the man who did put the time on this card? Can you remember?

A. No, I don't know.

Q. Can you discover by looking at these——

A. No.

Q. Well, you don't even look at it. Look at it.

A. I don't remember.

[fol. 237] By Mr. Freehill:

Q. What's that name there?
A. That's Wolff.
Q. Is that the man that marks out that card?
A. No.
Q. Is that the workman?
A. That is the workman.

By Mr. Sullivan:

Q. You have looked at this Libellant's Exhibit 1 and you now say you cannot recollect who put the amount of time on these cards?
A. No.
Q. But you are sure you didn't do it?
A. No.
Q. Well, you are sure you didn't do it?
A. I didn't do it, no.
Q. Does the same apply to the two cards that mention metal work?
A. Yes.
Q. You did put the time on there?
A. No.
Q. As I understand your testimony, you cannot now remember who did put it on?
A. No.
Q. And looking at these cards—these cards wouldn't indicate to you the name of the man that put the time on these cards?
A. No.
Q. I show you Libellant's Exhibit 2 designated on the top of each card in print as follows: "Material Card", consisting of eleven slips. Are they all of the same purport (showing them to witness)?

Mr. Freehill: Different material.
The Commissioner: Don't ask him what's in the slips. It appears from the slips themselves.

Q. Are your initials on these eleven slips, Libellant's Exhibit 2 (showing them to witness)?
A. No, not all of them.
[fol. 238] Q. How many are your initials on?
A. Three.

Mr. Freehill: That's full name.
The Witness: Full name.

By the Commissioner:

Q. You mean your initials are on eight and your full name is on three?
A. Well, the full name is on all of them but they were only three that I signed.
Q. Will you let me have the three that you signed?

Witness hands them to the Commissioner as requested.

Q. You have handed me back three slips that you say you have signed, and are they Libellant's Exhibit 2-a, b and c?
A. 2-a, b, c and d.
Q. That would be four?
A. They are the three that I signed.

The Commissioner: Those are marked as appears on their face, Libellant's Exhibit 2-a, b and c. They have been so marked by the stenographer.

By Mr. Sullivan:

Q. Is all the lead pencil writing on a, b and c just referred to in your handwriting?
A. All except the No. 6——
Q. On Exhibit 2-c, the "6" is not—a large "6" in lead pencil on the last line of this exhibit, is that correct?
A. Yes.
Q. All the rest in your handwriting. Will you state the charges on each of the three exhibits so I can get them in [fol. 239] the minutes. I won't have these exhibits with me.

Mr. Freehill: I object. They speak for themselves.
Mr. Sullivan: Well, I know but I won't have them with me. I simply want him to just state what the amount of those three exhibits are.
The Commissioner: What do you mean by charges?
Mr. Sullivan: The amount of money.
The Commissioner: I think if you want it on the record we better put it on by stipulation.
Mr. Freehill: I consent to that.
Mr. Sullivan: Well, I would like to have the witness give it.

The Commissioner: I don't think the witness is the proper person to testify what they say. If you want the amounts on the record, just read them on the record.

The stenographer copies into the record the following amounts:

Exhibit 2a	$8.00
	.85
Exhibit 2b	.04
	.03
Exhibit 2c	2.12
	.11

Q. There are eight of these slips you say that contain your name, but you did not sign it, is that it?

A. Right.

Q. And they start at the letter d to k, both inclusive, consisting of eight slips. Do you know who wrote your name [fol. 240] on the eight slips that contain your name which you did not write yourself?

A. I don't remember.

Q. Would the initial below help you any (showing witness slips)?

A. No.

Redirect examination.

By Mr. Freehill:

Q. Mr. Robicheau, will you explain fully how these slips come to be made up. Explain the process how they are made up.

Mr. Sullivan: If the Court please, I object to that. We have been all over that.

The Commissioner: No, I don't think we have. I will permit him to answer the question if he has anything to add.

Q. (Continuing:) Do you recall exactly how these slips are made up in the regular course of business at the Consolidated Shipbuilding Company?

Mr. Sullivan: I object to "regular course of business"; that's incompetent, irrelevant.

The Commissioner: Overruled.

Mr. Sullivan: Exception.

A. As a rule, the man is instructed to go around every night on the different jobs around the yard and get the time from the men that's working on the job and he makes the card.

Q. The timekeeper makes the card?

A. The timekeeper makes the card.

Q. Does the timekeeper present that card to you?

A. After it's made.

[fol. 241] Q. Do you have to verify the correctness of the entries in that card?

Mr. Sullivan: I object to that as calling for a conclusion, improper, incompetent.

The Commissioner: Overruled.

Mr. Sullivan: Exception.

A. Yes.

Q. And if there is an error what do you do?

Mr. Sullivan: Same objection.

The Commissioner: Overruled.

A. I correct them.

Q. With respect to the material cards, just——

By the Commissioner:

Q. Just let me ask a question here before we leave those time cards. Were all the time cards initialed by you?

A. Yes, your Honor.

By Mr. Freehill:

Q. On ship carpenter work?

A. Ship carpenter work.

Q. Do you know whether or not there are any other ship carpenter's cards besides these?

A. No.

By the Commissioner:

Q. You mean you don't know or that there were no other cards?

A. On this?

Q. Yes, on this job.

A. No.

Q. You don't know?

A. I don't know.

By Mr. Freehill:

Q. Mr. Robicheau, with respect to the material cards, some of these I find are signed by some one whose initials are H R. Were these material cards which you did not [fol. 242] sign—were they made up by a timekeeper working under your supervision?

Mr. Sullivan: If the Court please, I object to that. It's improper and incompetent. That isn't the proper way to get that kind of information. It calls for a conclusion and secondary evidence.

The Commissioner: It's leading.

Mr. Freehill: I withdraw the question.

Q. Will you explain how materials were ordered at the Consolidated Shipbuilding Company in October, 1925?

Mr. Sullivan: We object to that, incompetent, irrelevant.

The Commissioner: Overruled.

Mr. Sullivan: Exception.

A. Why, a man that's working on the job, he decides what material he has and he comes over to the man that's appointed to make the material card and draws the material out of the storeroom for that job.

Q. If you do not sign a card, who signs in your behalf?

Mr. Sullivan: I object to that, improper, incompetent irrelevant, secondary.

The Commissioner: Overruled.

A. The man that's instructed to make the material card.

Q. In other words, the timekeeper—is that a timekeeper?

A. Sometimes it's a timekeeper, sometimes it isn't.

[fol. 243] Q. Who in October, 1925, was employed by the Consolidated Shipbuilding Company whose initials were H R?

A. To tell you the truth, I can't remember.

Q. With respect to these material cards, do you have to verify these at the close of the day?

A. No.

Mr. Sullivan: I object——

The Commissioner: He has already answered that.

Q. Don't you have anything to do with these material cards to ascertain their correctness——

Mr. Sullivan: What cards?

Mr. Freehill: Material cards.

Mr. Sullivan: Well, there are two classes of them—all right.

A. No.

Recross-examination.

By Mr. Sullivan:

Q. Mr. Robicheau, in any of these time cards that came to you, did you go back to where the men were working and count them and find out whether or not they worked the number of hours that the timekeeper sent in to you?

A. Why, I am around the——

Q. No, answer my question.

Mr. Freehill: He has answered the question. He said he was around the yard——

Mr. Sullivan: Please don't interrupt.

Q. On any of these time cards——

[fol. 244] Mr. Freehill: I ask that the witness be permitted to answer the question.

Mr. Sullivan: I withdraw the question so that will take care of that.

Mr. Freehill: I object to his withdrawing the question.

The Commissioner: You can ask him on re-direct.

Q. With respect to the time on these time cards, did you go to any of these men while they were doing the work and ask them how long they worked—on these cards that you put in evidence (showing cards to witness). These are the cards that are in evidence, Plaintiff's Exhibit 1.

A. No.

Redirect examination.

By Mr. Freehill:

Q. Who puts the men on the ship carpenter's work?

Mr. Sullivan: That's immaterial.

The Commissioner: Objection overruled.

A. I do.

Q. After you assign them to work, do you make your rounds to see whether or not they are engaged in the work you assign them to?

Mr. Sullivan: I object to that as leading, improper.
The Commissioner: That is leading.
Mr. Freehill: I withdraw it.

Q. Do you during the course of the day do anything to check up the men that you have assigned to particular work?

[fol. 245] Mr. Sullivan: I object to that as leading.
The Commissioner: Overruled.

A. I go on the job quite often during the day.
Q. And during the course of these inspections what do you do?
A. I see that the men are working.
Q. That you have assigned to these particular jobs?
A. Yes.

Recross-examination.

By Mr. Sullivan:

Q. Your inspection consists of going where they are and looking at them and going on to some other business, is that it?
A. Yes, sir.
Q. How many men did you have under you at that time?
A. I don't remember.
Q. Can't you give us any estimation?
A. No.
Q. 100?
A. I don't remember.
Q. How large a floor space is this Consolidated Shipbuilding?
A. I don't know.
Q. Do you know how many acres it covers?
A. No.
Q. Do you know how many feet it runs along the railroad there?
A. No.
Q. Does it run 500 feet long?
A. I don't know.

Q. Will it run 100 feet long?
A. Yes.
Q. Will it run 200 feet long?

Mr. Freehill: I think it's immaterial. I object to it.
The Commissioner: I think that's carrying it pretty far.

Q. How wide is the building in which these works are?
A. I don't know.
Q. You haven't the slightest idea?
A. No.
[fol. 246] Q. Do you know how far it is from the front of the building back to the river?

Mr. Freehill: I object to that.
The Commissioner: Objection sustained.

By the Commissioner:

Q. Why do you put your name or why is your name put on the material cards?

A. You cannot get the material out of the storeroom, your Honor, without it's signed by a foreman or by a man that's appointed by the foreman for that purpose.

Mr. Sullivan: I object to that. He stated that he did not put his name on.

Q. In this case, other people put your name on these slips to get material out but you didn't know about that at the time—did you know about it at the time they put your name on?

A. They are authorized by me to put my name on the card.

Q. As the cards were made out, did you know that they were doing it—did you know about each slip or did you see them at the time—did you see the slips at the time?
A. No.
Q. They didn't come to your attention?
A. No, your Honor, they didn't.

By Mr. Freehill:

Q. Do I understand you to testify that in each instance where material was ordered for your department and where you didn't sign the slip that the person signing that slip was authorized by you?

A. The person signing the slip was authorized by me to sign my name to the slip.

[fol. 247] By the Commissioner:

Q. Was that in the case of each slip or did they receive a general authorization to sign for any slips that were necessary?

A. Any slip that's necessary on that job.

ALBERT CHRISTIAN, being duly sworn and examined as a witness for the libellant, testified as follows:

By Mr. Freehill:

Q. Mr. Christian, by whom are you employed?
A. Consolidated Shipbuilding Corporation.
Q. Where are they located?
A. Morris Heights, New York City.
Q. How long have you been employed by that concern?
A. About 30 years.
Q. In what capacity?
A. All capacities.
Q. Are you now the superintendent of the Consolidated Shipbuilding Company?
A. I am.
Q. What has been the nature of your work during that time?
A. During the 30 years?
Q. Yes.
A. Oh——

Mr. Freehill: Will you concede that he is qualified?
Mr. Sullivan: No, sir.

A. Do you want me to answer?
Q. Yes.
A. Why, I came there as a journeyman machinist. I passed from there to in charge of the testing department—no, journeyman machinist first, assistant foreman in the [fol. 248] machine shops next, from there I went to the—in charge of the testing department testing gasoline marine engines and from there I went assistant superintendent and assistant superintendent to my present position.

Q. Are you in charge of the entire shipbuilding yard in so far as construction of vessels in concerned, construction and repair?

A. Yes, in the way of supervision—general supervision.

Q. Do you recall the yacht "Drifter" that was built by the Consolidated Shipbuilding Company in or about October, 1925?

A. I do.

Q. Do you recall her coming back from Port Newark in damaged condition in October, 1925?

A. I remember it, yes.

Q. Did you have a conversation with Mr. Jolly before any repairs were made on this boat?

A. I don't—I have very little recollection of that, probably did.

Q. I show you a survey report and ask you to refresh your memory as to whether or not you had any such——

Mr. Sullivan: I object to that——

The Commissioner: You may ask him whether it refreshes his memory.

Q. Will you please examine that paper.

Mr. Sullivan: Wait a moment, if the Court please, he hasn't laid any basis and the witness is looking at the paper.

The Commissioner: The witness can look at the paper. He has a right to look at the paper to see whether it refreshes his recollection.

[fol. 249] Mr. Sullivan: He hasn't established any basis.

The Commissioner: Objection overruled.

Q. Will you please examine that paper and state whether or not your memory is refreshed?

A. Yes, I remember something about that.

Mr. Sullivan: Now, if the Court please, I ask that the witness be directed to put the paper down.

The Commissioner: No, he doesn't have to do that. He can state to what extent his memory is refreshed.

Mr. Sullivan: If the Court please, he is reading from the paper.

The Commissioner: He isn't reading yet.

Q. Did you inspect the yacht "Drifter" on the occasion of its return from Port Newark?

A. I did.

Q. With Mr. Jolly?

A. It may have been Mr. Jolly.

Q. I ask you to refresh your memory as to whether it was.

Mr. Sullivan: If the Court please, he has refreshed his recollection.

The Commissioner: No, I will permit him to refresh his recollection.

Q. (Continuing:) Do you recall whether or not that was Mr. Jolly?

A. I couldn't say whether it was Mr. Jolly. The insurance men came up there and they don't give me their name. I was with an insurance inspector.

[fol. 250] Q. Did you both examine the boat at that time?

A. I couldn't say. We may have examined her one after the other. We may have done that together. It was long ago this happened.

Q. That was a brand-new boat before she left the yard in October?

Mr. Sullivan: We have been over that. The evidence proves it.

The Commissioner: The evidence shows it was a new boat.

Q. After your inspection what repairs were recommended on that boat?

Mr. Sullivan: If the Court please, the counsel is handing him a paper. That question doesn't justify his handing him a paper. I ask that counsel withdraw the paper from in front of the witness until he has answered the question.

The Commissioner: The witness can say whether he can answer the question without the aid of anything to refresh his recollection.

Question read.

Mr. Sullivan: I object to that as improper and incompetent. The recommendation is not a proper description of the damages to that boat and they are not the basic facts—secondary evidence and a conclusion.

The Commissioner: I will take it for what it's worth.

Mr. Sullivan: Exception.

Q. Will you state what repairs were recommended, Mr. Christian?

A. The necessary repairs to put it in the same condition [fol. 251] as when the ship was afloat from the dock.

Q. Was it necessary to remove any planks that were broken?

Mr. Sullivan: If the Court please, I objec- to that as leading. Let the man——

The Commissioner: I think that's leading.

Q. Well, now what was necessary to put that boat in first class condition?

A. There were new planks necessary——

Mr. Sullivan: If the Court please, the question involved here of what's necessary to put this boat in first-class condition and the question before your Honor is the damage and the necessary repair.

The Commissioner: Objection overruled.

Mr. Sullivan: Exception.

A. There were new planks necessary, there was a broken flagpole, broken stem and band was damaged and there were some other small items that I don't recollect.

Q. How many planks, to the best of your knowledge, were broken?

A. To my recollection there were about four.

Q. Was this hole at midship on the starboard side at or about the water line?

A. I can't remember.

Mr. Sullivan: I object to that.

The Commissioner: He says he can't remember.

[fol. 252] A. (Continuing:) I can't remember whether it was a hole or just damaged planks.

Q. Will you please examine this survey report and state approximately where that damage was on that boat.

The Commissioner: You can ask him whether it refreshes his recollection.

Mr. Sullivan: He hands this witness a paper without your Honor ruling that he should.

The Commissioner: The question is objectionable. Objection sustained.

Q. Mr. Christian, will this paper refresh your memory as to approximately——

Mr. Sullivan: I object to that——

The Commissioner: Objection overruled.

Mr. Sullivan: Exception.

Q. Will this paper refresh your memory, Mr. Christian, as to approximately where that damage was on the boat?

A. (Referring to Libellant's Exhibit I of October 16) No, it don't tell me where it is—where it was, and I don't remember just where it was. It was in the hull of the boat——

Mr. Sullivan: Your Honor, I never criticise any lawyer *of* wasting time because I don't think I am in a very good position, but the evidence here hasn't been contradicted, if your Honor recollects, where the indentation or wherever the hole was.

The Commissioner: Yes, I think we have gone over the position.

[fol. 253] Mr. Freehill: All right, as long as it is conceded——

Mr. Sullivan: I don't concede anything. The proof shows it.

Q. To make these repairs was it necessary to drydock the boat?

A. It was.

Q. How long was she drydocked, to your knowledge?

A. I don't remember exactly, about a week.

Q. To renew these broken planks, about which you have testified, was it necessary to remove any machinery to get at these repairs?

A. Probably was.

Q. If the hole was in the midship on the starboard side above or at the water line, would it be necessary to remove any machinery?

A. If there was machinery in the way it would be necessary to remove them.

Q. Was it necessary to paint the entire hull?

A. Yes, sir.

Q. Inside and out?

A. No, not the entire inside but in the way of the repair and completely on the outside of the hull.

By the Commissioner:

Q. Why was that—why did you have to paint all the way around?

A. Well, it's pretty hard to illustrate. You put in new planks, say the boat has four coats of paint while the new plank has no paint in, we build it up with these coats, in time you get the same thickness as the paint is on the rest of the boat. While that new paint looks bright and fresh, the paint that's been on a week or so looks a little dark. In fact, if the boat is standing there, you see the new streaks [fol. 254] of paint and the other dark, so you give it an entire coat to match it up.

Q. You have to give it more than one coat all the way around?

A. One coat.

By Mr. Freehill:

Q. How many coats were necessary for the planking that was removed and renewed?

A. Why, I couldn't say, probably three or four to build it up.

Q. Before the hull was painted, was it necessary to sandpaper it?

A. Yes.

Q. Was the flagpole renewed?

A. Flagpole?

Q. Yes, on the "Drifter"?

A. I don't remember.

Q. Was it necessary to remove the flagpole?

A. To remove it?

Q. And put a new one in?

A. Well, if it was gone they would have to put a new one in, yes.

Q. I ask you to state whether or not you can refresh your memory from this paper (handing witness paper)?

A. (Reading the paper.) That means there was a new pole and new socket.

Mr. Sullivan: I move to strike it out. He doesn't say it refreshes his recollection. It is simply reading——

The Commissioner: I think the testimony already shows——

Mr. Sullivan: I move to strike out the last answer.

Q. Where the machinery was removed to get at the repairs, of course it was necessary to replace those fittings and machinery?

A. Yes, and refinish them.

Q. And refinish them?

A. And repaint them.

[fol. 255] Q. I show you this plan and ask you to state whether or not your memory is refreshed as to whether or not there was any machinery in the path of these repairs?

A. This plan don't show. This plan isn't complete. It just shows an outline of two main engines only; all the auxiliaries and piping is missing.

Q. Will the specifications refresh your memory (showing witness paper)?

A. I suppose it would if I had time to read it. Are you going to give me time to read all this? I am trying to go through this as quick as I can.

Q. Take your time, Mr. Christian. Does that refresh your memory?

A. Yes, more or less; let's see the blueprint again.

Q. Here it is (showing blueprint to witness).

A. Which side was this hole on?

Q. Starboard side amidship. Does that refresh your memory as to whether there was machinery or fittings in the path of these repairs?

A. No, it don't. The only thing that does, it tells me that there was an electric generator and there was an electrically operated bilge pump and also hand bilge pump, and it is possible that that generator was on that side but I don't know. The drawing or specifications don't let me know that.

Q. I ask you to examine Libellant's Exhibit 2 and ask you to state whether or not the items of repairs and labor and services listed on that exhibit were reasonable and necessary to complete these repairs in first-class condition.

Mr. Sullivan: If the Court please, I object to that on the ground that there is no basis for that. The question would bring out whether it was a personal inspection. In order [fol. 256] to be qualified to speak on that, he would have to see all this work and understand it before it was done.

The Commissioner: I don't know what he can testify to unless you ask him what he knows about the bill. I sustain the objection to the question in that form.

Q. Will you please examine Libellant's Exhibit 2, Mr. Christian——

Mr. Sullivan: If the Court please, I object to him handing that statement to him. There is no basis for it.

The Commissioner: Well, he hasn't asked him any question about it yet. I think he can hand the paper to the witness if he wishes. I don't know what the question is yet.

Q. (Continuing:) Will you please examine Libellant's Exhibit 2 and state whether or not the items of work, labor and services as appearing on that bill were reasonable and necessary to put this boat in the same condition in which it was before the damage?

Mr. Sullivan: That's the same objection. That's what the Court has held against you.

The Commissioner: I think that's the same question. You have to ask him what he knows about it first. I don't know how far his knowledge goes.

Q. Well, you saw the damage to this boat, Mr. Christian, did you not?

A. I did.

[fol. 257] Q. And from time to time during the course of the repairs did you see the work done?

Mr. Sullivan: I object to that as leading.

The Commissioner: I overrule the objection.

Q. (Continuing:) Did you see that?

A. What is the question?

Question read.

A. I seen the work in progress, yes, and I seen it when it was finished.

Q. What is the reasonable cost of hauling and launching a boat of the type of the yacht "Drifter"?

A. Well——

Mr. Sullivan: We object to that, if the Court please, unless the circumstances and conditions are stated and the necessity for it.

The Commissioner: Objection overruled.

A. The cost of hauling the boat——

Q. No, hauling and launching the boat before and after the repairs?

A. We have an established figure given by the company, which was——

Mr. Sullivan: We object to that, if the Court please.

The Commissioner: Overruled.

Mr. Sullivan: Exception.

Q. Would you say that $35 was fair and reasonable?

A. It was $35, a minimum charge.

[fol. 258] Mr. Sullivan: I object to that as leading.

The Commissioner: Sustained.

Mr. Sullivan: I move to strike the answer out.

The Commissioner: Motion granted.

Q. What was the standard price for hauling and launching a boat of the type of the yacht "Drifter"?

A. $35, the minimum rate.

Mr. Sullivan: Objection.

The Commissioner: Overruled.

Q. That is the minimum rate?

A. Yes.

Q. And that was in effect in October, 1925?

A. Yes.

Q. Now, with respect to lay days, what is the charge made by shipbuilding companies for lay days?

Mr. Sullivan: If the court please, there is no evidence in here and no claim about any lay days.

The Commissioner: Objection overruled.

Mr. Sullivan: Exception.

A. We use the ways as a tool. It is necessary to put the boat on this tool to do the work.

Q. What is the charge made for that per day?

A. $35 was the hauling and $30 is the rate for every following 24 hours.

Mr. Sullivan: If the court please, I move to strike it out, no evidence to show how long it was necessary to keep that boat on the ways.

The Commissioner: Motion denied.

Mr. Sullivan: Exception.

[fol. 259] Q. And that boat was on the ways for six days or a week?

Mr. Sullivan: I object to that as leading.
The Commissioner: Sustained.

Q. How many days was the boat laid up on the ways?
A. I don't know exactly——

Mr. Sullivan: I object to that.
The Commissioner: Objection overruled.

A. (Continuing:) I don't know exactly, about a week.
Q. Are you familiar with the customary and usual charge made for hauling or towing a boat of the type of the "Drifter" from the Port of Newark to Port Morris?
A. No, I don't know what the towing companies charge for that, I suppose $150 to $200.

Mr. Sullivan: I move to strike that out, if the court please.
The Commissioner: Motion is granted to strike out the last part "I suppose $150, etc."
Mr. Sullivan: I move to strike out the whole answer.
The Commissioner: That motion is denied.
Mr. Sullivan: Exception.

Q. During the course of your experience, have you had experience in engaging towing companies to tow boats of the type of the "Drifter"?
A. The "Drifter" is a boat of——

[fol. 260] Mr. Sullivan: If the court please, the only answer is yes or no.
The Commissioner: No, I will let him answer the question in his own way.

A. The "Drifter" is only one of its type. There is no other boat like it, but I have hired boats to tow small boats like that and the prices vary from $60—$70 to $150.
Q. For how far a distance?
A. Well, I had a boat towed from Hell Gate to the works not long ago and I think the price was $75.
Q. Was that a boat smaller or larger than the "Drifter."

Mr. Sullivan: I move to strike that out. That's long subsequent to 1925.

The Commissioner: Let him tell about it for what it's worth.

Mr. Freehill: Do I understand then there is no objection to the $150 as being the reasonable charge for towing to and from Port Newark to Morris Heights?

Mr. Sullivan: This isn't $150—this is $75.

The Commissioner: You dispute the fact that the boat was towed from the place where it was claimed to have been damaged back to the Consolidated Shipbuilding Corporation for repairs? I understand that you contend that that is not an allowable item because the towage was not proper, but do you admit that it was towed back?

Mr. Sullivan: I am going to answer your Honor's question as a precaution. We contend that the boats that are repaired down at Port Newark—that there are available [fol. 261] shipyards there and, second, that the towage back is not a part of the damage that they sue for here.

The Commissioner: Well, do you admit the fact of the towage back or do you deny that or do you want them to prove it?

Mr. Sullivan: I understand that the evidence before your Honor shows that it came back. We are not offering any evidence to the contrary.

The Commissioner: Well, if you don't admit it we will have to take testimony on it.

Mr. Sullivan: Well, just a moment, your Honor, I think that you and I don't disagree. My recollection is that they have testimony in here to show that they brought it back and that this work was done up there. But I deny that it was necessary to bring it back to have it repaired.

The Commissioner: Do you admit that it was brought back?

Mr. Sullivan: Why, I am convinced from the testimony that it was physically brought back, your Honor, but any consequence of the bringing back is without prejudice, it wasn't necessary to do it.

Q. Mr. Christian, was it necessary to bring this boat back to Morris Heights to be repaired?

Mr. Sullivan: We object to that as leading if the court please, and improper.

The Commissioner: You can cross examine as to any answer he gives to that. I will allow the question.

[fol. 262] Q. Was it necessary to have it repaired at Morris Heights, Mr. Christian?

A. I don't like to answer that question. Have I got to answer?

Q. No, you don't have to. Could the damage which you observed upon the return of the yacht "Drifter" to Morris Heights—could that have been repaired at Port Newark unless it were in a shipbuilding yard there?

A. I don't know if they had the possibilities there to do that work or not.

Q. Assuming that they didn't have the possibilities there——

Mr. Sullivan: That's improper and incompetent.

The Commissioner: No, I think that's proper. He may ask it. It doesn't prove anything one way or the other but he can ask the question. Objection overruled.

Mr. Sullivan: Exception.

Q. Assuming that there was no yard there, could it be repaired without being brought to Morris Heights or some other place?

A. I think it could but at greater expense.

Q. Was this job done at a time—at a cost basis?

Mr. Sullivan: I object to that. The papers show. It's in evidence.

The Commissioner: I will allow the question.

Mr. Sullivan: Exception.

A. What is the question?

Q. Were those repairs carried out on a time and material basis?

A. Yes.

Q. No charge was made for profit to be——

[fol. 263] Mr. Sullivan: If the court please, I object to that as improper and incompetent.

Mr. Freehill: All right, I will withdraw it.

Q. Do I understand, then, that the cost of the repairs was based upon an actual time spent in the repairs and materials used in the construction of that boat?

Mr. Sullivan: I object to that, improper incompetent, leading and calling for a conclusion.

The Commissioner: I think he has answered that.
Mr. Freehill: I think he said yes.

Q. Now, assuming that a boat of the type of the "Drifter" had a hole stove in on the starboard side amidship, just about at the water line, and the boat was repaired, would you say that it would take about 49 hours for painters to paint that boat inside and out——

Mr. Sullivan: We have gone all over that.
The Commissioner: I think it's material. Do you object to it on the ground of immateriality?
Mr. Sullivan: I object to it as leading and improper.
The Commissioner: It is leading. Objection sustained.

Q. Assuming that a boat of the type of the "Drifter" had a hole stove in its starboard side at the water line admidships and that machinery had to be removed to get [fol. 264] at the repairs, that the boat had to be painted, the planks renewed, the stem renewed, the flagpole and socket renewed and the boat painted; what would you say would be the fair and reasonable value or cost of those repairs?

Mr. Sullivan: I object to that, if the court please.
The Commissioner: I think you will have to describe that hole a little more definitely.
Mr. Freehill: I will describe the hole.
The Commissioner: I sustain the objection to the question in the present form.
Mr. Freehill: I understand the objection is sustained on the ground that I haven't described the hole?
The Commissioner: Right.

Q. Assuming the state of facts which I have just outlined and this hole was approximately 12 by 8 inches in breadth, that four planks had to be removed that were broken, and renewed; what would you say would be the fair and reasonable value of the cost of putting that boat in the same condition in which it was before the damage?

Mr. Sullivan: I object to that, Mr. Commissioner.
The Commissioner: I will let the witness answer if he confines himself to October, 1925.

Q. (Continuing:) In October, 1925.
A. I have lost the question now.

Q. I have asked you to state what would be the fair and reasonable value of repairing that boat.

[fol. 265] Mr. Sullivan: Well, you didn't ask him where.

Mr. Freehill: At New York City, naturally.

A. To do that work that we done on that boat, whether that price was in my opinion fair—is that what you are——

Q. Yes, what was that price that you think would be fair and reasonable?

A. I seen in there around $800 and I think that's a reasonable price.

Q. Was that based on a time and material basis?

A. I don't care how it was done, I think that wasn't bad.

Q. Assuming that was based on a time and material basis, would you think that would be fair and reasonable?

A. Yes, in my opinion it would be right.

Q. And those repairs that have been testified to were in your opinion necessary?

Mr. Sullivan: If the Court please, I object to that as improper, incompetent and leading.

The Commissioner: Well, I don't think the witness has yet been qualified to answer that question. Objection sustained.

Mr. Freehill: Well, I withdraw it then.

Q. Mr. Christian, what experience have you had in the repair of yachts of the type of the "Drifter"?

A. What experience?

Q. Yes.

The Commissioner: No, I don't mean that. He is not qualified as an expert. I mean that he is not qualified by [fol. 266] any evidence as to what he knows about these particular repairs.

Mr. Freehill: He has testified that the painting and the planks to be renewed and the flagpole to be renewed——

By the Commissioner:

Q. Do you remember these repairs being made in your yard?

A. Just vaguely.

Q. Were you around when they were being made?

A. Yes.

Q. You followed the progress of them?

A. In a way, yes.

Q. I suppose you had other boats in there at the time?

A. Oh, yes, many such repairs.

Q. Did you pass on the reasonableness of this bill at the time it was sent out?

A. No, that don't come under me——

Mr. Sullivan: I object to that as improper.

Q. At that time you didn't know whether the bill was reasonable or not?

A. I didn't know what the bill was, the first time I have seen the bill is here today.

Mr. Freehill: Now can he answer that question?

The Commissioner: From his recollection which he says is vague he can state whether or not he can make an answer to the question.

Question read.

[fol. 267] By Mr. Freehill:

Q. Can you state—assuming that the surveyor found that there were four planks broken amidship on the starboard side above the water line and that they had to be renewed at the butts, that a flagpole and socket were broken and had to be renewed, that a band on stem was broken and had to be renewed, that the boat had to be drydocked, that removals were necessary to effect repairs, that paint work had to be done, will you state whether or not it was necessary to make those repairs to put that boat in the same condition in which it was before the damage?

Mr. Sullivan: I object to that as leading, improper. We have been all over that.

The Commissioner: He is asking him the question as an expert. Objection overruled.

Mr. Sullivan: Exception.

Q. Was it necessary to do that work?

A. That work was necessary in order to deliver a new boat.

Cross-examination.

By Mr. Sullivan:

Q. That boat was built by your company, the Consolidated Shipbuilding Company?

A. It was.

Q. And it was to be delivered—delivery was to be made down to Port Newark to the person who had it built?

A. So the record shows.

Q. And before delivery was made, an accident happened and it had to be brought back?

A. Yes.

Q. Did your company advertise to the shipbuilding business or ship repair business to put in bids to have these repairs done?

A. I know nothing about that.

[fol. 268] Q. You know it didn't happen, don't you?

A. What didn't happen?

Q. There was no advertisement to get bids of other ship repairing companies to do this work.

A. That I couldn't say; I do not know.

Q. Well, you say you are superintendent there?

A. General superintendent in connection with the mechanical work in the yard.

Q. Including repairs?

A. Including repairs, but the office and executive work and such work I have nothing to do with.

Q. Did it come to your attention that there was any advertisement by anybody to the other repair companies to do this work?

Mr. Freehill: I object to it as immaterial and I concede there were no bids solicited for the doing of this work—no advertisements.

Q. Then, so far as you know, when this boat came back with this depression in the starboard side, your company went right ahead and did the work that's been described here?

A. That's right.

Q. So far as you know, was any notice sent to the "White City," to William A. Rhodes and Herbert Simpson, before this work was done?

Mr. Freehill: I object to it as immaterial whether notice was given to them before the work was done.

The Commissioner: I will let him answer it. Let him state whether or not he knows.

A. It wouldn't be in my department to know.

Q. Well, you are still superintendent there?

A. Yes, but that wouldn't come in my department.

[fol. 269] Q. Well, let us see. Let's see——

Mr. Freehill: I object; he said he didn't know.

Q. So far as you know, was any word sent to the "White City", to William A. Rhodes and Herbert Simpson, owner of the "White City"——

Mr. Freehill: I object.

The Commissioner: He can say whether or not he knows.

A. I don't know.

Q. Do you mean to say that that repair work on that "Drifter" could have been done in no other place except at your shipyard?

A. No, I wouldn't say that, no.

Q. Well, could it?

Mr. Freehill: I object to that. That's argumentative.

The Commissioner. I will let him answer.

A. Could it be done elsewhere?

Q. Yes.

A. Oh, I think so.

Q. Now, in order to make that repair, it had to be put in drydock?

A. Right.

Q. And then after that all they had to do was to take out the plank, put in new plank, and then whatever other damage occurred?

A. What other work was necessary

Q. Do you mean to say that that work could not have been done down at Port Newark?

A. I don't know whether they could do it there or not.

[fol. 270] Q. Well, let us take the same men—take men that are equally competent with the men that did the work, could they do it down there?

A. If they had the facilities and tools, yes.

Q. Now, all the repairs consisted of was to drydock the boat, replace the planks and such other adjustment on the inside as was necessary and paint it, is that true?

A. Yes.

Q. You said on direct examination when you were asked if the work could be done down in Newark, that you didn't want to answer that question, is that correct?

The Commissioner: That appears from the record.

Mr. Freehill: I object to it as immaterial.

The Commissioner: No, I will let him answer it.

A. What was the question?

The Commissioner: "Why didn't you want to answer the question."

A. (Continuing:) Because I didn't know what facilities they may have down at Port Newark.

Q. You know it's a boating center——

A. I am not sure——

The Commissioner: You are wasting time on this cross examination now.

Q. The delivery was to be made of the "Drifter" down at Port Newark, wasn't it?

A. I think it was. I think that's what the order called for.

[fol. 271] Q. Then your company, after this damage was discovered, ordered your men to bring it back?

A. I don't know, I don't know about that.

Q. Do you know how it got back?

A. It was towed back.

Q. By whom?

A. I don't know.

Q. Did your company pay for the towing of it?

A. That I don't know.

Q. And you are general superintendent there and you mean to say that you don't know whether your company ordered it back or not?

A. It didn't come under my department.

Q. Independent of your department, do you say you don't know whether——

The Commissioner: He said he didn't know. Don't ask him that question again. You are wasting time.

Examination suspended.

Mr. Bolen recalled.

By Mr. Freehill:

Q. Mr. Bolen, have you produced all of the time cards which you used in making up the bill dated October 28, marked Libellant's Exhibit 2?

A. No, I have not.

Mr. Sullivan: We have been over that before.

The Commissioner: Objection overruled.

Q. I show you certain time cards marked Libellant's Exhibit 1 and Libellant's Exhibit 2 of today's date and ask [fol. 272] you to state whether or not they are all the cards you could find?

A: They are all that I could find.

Q. Were these cards for work in connection with the yacht "Drifter"?

A. They were.

Q. Were they made in the regular course of business?

A. Yes, sir.

Mr. Sullivan: If the Court please, I object to that as improper, incompetent.

The Commissioner: Objection overruled.

A. They were.

Q. And are they used by you in the making up of bills for all work and materials furnished on repairs?

A. Yes, they were.

Mr. Freehill: I offer them in evidence.

Mr. Sullivan: I object, if the Court please, as improper, incompetent; the memoranda have not been identified with this proceeding, hearsay, incompetent, and the witness not shown qualified to speak with respect to these or to identify the work done and it does not show that these matters came before him in his official capacity.

The Commissioner: I will permit these papers to be marked but will permit you to submit a memorandum if you wish, on the question of the admissibility in admiralty of the business records of a corporation made in the regular course of business. You may make the motion—you may reserve the right to make a motion to strike out but for the present I will permit the exhibits to be marked.

[fol. 273] Mr. Sullivan: For identification.

The Commissioner: No, to be marked in evidence, subject to a later motion to strike out.

Mr. Sullivan: Well, I would like to cross examine in due course.

The cards are marked Libellant's Exhibit 3 of today's date.

Q. Have you made a search for the other time cards?
A. Yes, sir.
Q. Could you find them?
A. I could not.

Mr. Sullivan: I object to that.
The Commissioner: Overruled.

Q. Now, these time cards are given to you, as well as the material cards, before you make up the bills that you render?
A. Yes.
Q. And in this instance you had them before you, before you made up the bills?
A. Yes, sir, before the bills were made up.
Q. Did you check them over carefully?
A. They were checked by our billing clerk.
Q. Under your supervision?
A. Yes, sir.

By the Commissioner:

Q. Referring to Libellant's Exhibit 2, was this bill based in part on time cards which have not been produced here?
A. Yes, sir.
Q. Did you correctly summarize the work described in those time cards?
A. At that time, yes,
Q. This is a correct summary of the work described in all the time cards?
A. Yes.
Q. Including those that were lost?
A. Yes, sir.

[fol. 274] By Mr. Freehill:

Q. This boat was towed from Port Morris down to Port Newark and then towed back to Morris Heights?

A. Towed back again to Port Newark.

Q. And then towed back again to Port Newark to be put aboard the vessel?

A. Yes.

Q. How much did you pay for the towing charges?

A. $75 each way.

Q. And that was three trips?

A. Yes.

Q. $75 each?

A. $75 each.

Recross-examination.

By Mr. Sullivan:

Mr. Sullivan: This Libellant's Exhibit 3 consists of how many cards—have you counted them?

Mr. Freehill: No, I haven't. I will count them for you.

Q. Libellant's Exhibit 3 you say consists of time cards?

A. Yes, sir.

Q. Is any writing on those cards made by you?

A. Yes, sir.

Q. When you say, "Yes, sir" to my question, you mean that there was writing on the cards?

A. Writing on the cards, yes, sir.

Q. Was any of it your writing?

A. No, sir.

Q. Is any of it your writing today?

A. No, sir.

Mr. Freehill: I think there are 31—I believe.

Q. Libellant's Exhibit 3, I am informed, consists of 31 time cards.

A. Yes, sir.

Q. What position do you hold in the company?

A. I am the cashier.

[fol. 275] Q. Was that your position at that time?

A. All the bills go through my hands.

Q. No, no. I ask you was that your position at that time?

A. Yes, sir, that was my position at that time.

Q. At that time in October, 1925, how many men did you have working there?

A. I couldn't say exactly.

Q. Could you give us a little bit more information than the other superintendent could?

A. Probably 400.

Q. And what is the area of your building?

A. Well, the plant-s about 1,000 feet long, I should say, and perhaps 300 or 400 feet wide.

Q. And you have yards beside?

A. Yes, sir.

Q. And was that the condition of affairs back in October, 1925?

A. Yes, sir.

Q. Did you go out to see if any of this work was being done?

A. Yes, sir.

Q. All you know about this Libellant's Exhibit 3 is that they were handed to you by some other department, is that it?

A. Yes, sir, all departments hand their cards in the office.

Q. And whether or not these men who were the signers of the information put on the cards gave it correctly or not, you don't know?

A. No, sir.

Q. Did your company—before this company did this work, did you advertise for any bids?

A. No, sir.

Mr. Freehill: We concede that we didn't advertise.

Q. How did you come to do this work?

Mr. Freehill: I object to that as immaterial.

[fol. 276] The Commissioner: Overruled.

A. We notified the owner by wire and we got word from him to make these repairs and——

Q. What was the contents of the wire that you sent to the owner?

A. Just stated the fact that the boat was damaged in route to the steamer.

Q. What was his reply?

A. His reply was to make the necessary repairs and ship it on the earliest possible steamer.

Q. And where was delivery to be made?

A. At Port Newark—he named the steamer that he would like it to go on.

Q. Had you made delivery of the boat when it went down?

A. No, sir.

Q. At the time it was damaged?

A. No, sir.

Q. When was delivery made?

A. Delivery was made about the 5th of November I think it was, somewhere in that neighborhood.

Q. Well, you attempted to make the delivery down there in October?

A. In October.

Q. Then something happened and you made a second delivery?

A. Yes, sir.

Q. Are you acquainted with Port Newark?

A. No.

Q. Of course it's a big boat center, don't you know that—Port Newark?

A. I was there once.

Q. You know that ocean-going ships are there?

A. Yes.

Q. And in the trade it's considered one of the largest boat centers in the metropolitan district, isn't it?

Mr. Freehill: I object to that, there is no testimony to that effect.

[fol. 277] A. I don't know.

Q. You know it's an important boat center?

A. I know it's an important boat section for large vessels.

Q. Did you go down there to see if they could make those repairs?

Mr. Freehill: I think that's immateral.

The Commissioner: Overruled.

A. No.

Q. Did you send any letters to any of the boat companies down there—ship companies to fix it up?

A. No, sir.

Q. Well now, let us see what this mystery is. The elements of this claim here is you took the boat up on drydock at your Consolidated Shipbuilding Company shipyard?

A. Yes.

Q. You examined and found what work had to be done?
A. Yes.
Q. And then they did the work—well, now, that's ordinary work that could be done in any shipyard, isn't it?
A. Yes.

By Mr. Freehill:

Q. Were any of the claimants, Simpson or Rhodes, notified of this damage and that the repairs were being done?
A. They were.

By Mr. Sullivan:

Q. When did that happen?
A. Right at the time.
Q. That was after it was all done—I got your letters.

[fol. 278] Mr. Freehill: If you want to testify, I will put you on the stand.
Mr. Sullivan: All right, put me on.

By Mr. Freehill:

Q. Were they notified on or about October 19, 1925?
A. About that time.

By Mr. Sullivan:

Q. Now, Mr. Bolen, that was after the repairs were finished that you notified them?
A. No, they were notified as soon as the boat got back to our works.
Q. Have you got a copy of that letter?
A. No, sir.
Q. We have——

Mr. Freehill: I object to that as argumentative. I ask to strike it out of the record. If he wants to offer a letter I am perfectly willing he should put it in.
The Commissioner: Strike it out.
Mr. Sullivan: Well, I offer the letter he refers to now and I produce it.
The Commissioner: Well, you better wait until you get it before you offer it.
Mr. Sullivan: I didn't bring the case with me.

The Commissioner: Then you will have an opportunity to produce it at the proper time.

Q. When you sent that letter—did you write the letter?
A. No, Mr. Roos.
Q. Did you see that letter?
A. I saw it later.
[fol. 279] Q. Can you recall the contents of it?
A. No, as I remember——

Mr. Freehill: I object to it as——

Q. It contained a bill for the repairs?
A. No, sir, as I remember——
Q. Just a minute; when did the boat come back?
A. It came back the day after the accident, the day after she was to be delivered there.
Q. And when was the letter written?
A. I can't say the exact date.
Q. Well, let me get it right so I won't have to bring it back. You only wrote one letter. It was addresed to Alexander Simpson?
A. As I remember there was just one letter.
Q. And that was to Alexander Simpson?
A. Yes.

Mr. Freehill: If you show it to me, I won't ask you to come down here. I will consent that it be put in the record.

Q. In any event, there was no effort to have any other company make those repairs except your company?
A. No, sir.
Q. And as soon as you heard it was damaged you went ahead and did the work?
A. We got in touch with the owner and he instructed us to do the work.

Mr. Christian, witness for the libellant, resumes the stand.

By the Commissioner:

Q. Can you explain, Mr. Christian, this item of shipping clerk on Libellant's Exhibit 2 for identification (showing it [fol. 280] to witness)?

A. I can in a way; I believe that clerk—Mr. Bolen could do that better than I could. I believe that—would you let Mr. Bolen answer?

Q. You don't really know about that?

A. No, I don't.

Mr. Freehill: Mr. Bolen does.

The Witness: Yes, Mr. Bolen does. I think the clerk was sent there after the accident, wasn't he?

Mr. Bolen: No, he went there to get the shipping papers out and the boat didn't arrive there that day and he stayed until about 8 or 9 o'clock and then he finally got word that the boat wasn't coming, that she had stopped somewhere, and then he had to make the second trip where the boat was——

Mr. Sullivan: We are not taking this as testimony, are we?

The Commissioner: We might as well.

Mr. Sullivan: I didn't know they were taking that down as part of the record. I insist that it be in due course and ask that question—that's a voluntary statement.

The Commissioner: Strike it all out. You move to have that stricken out, do you?

Mr. Sullivan: Yes, sir.

The Commissioner: All right, the motion is granted.

Q. Why were laborers required in doing work on this boat?

A. Well, that's an awful hard item to explain. They cleaned bilges, chips and things from bil-es, dirt, etc.——

[fol. 281] Q. Do you require laborers in pulling the boat up on the railway?

A. Yes, that comes under the——

Q. That comes under charge for railway——

A. Then putting up a scaffold, odds and ends, and repair job, remove the equipment. We do that, we put the workmen on board to remove the equipment—before we put the workmen on board.

Mr. Bolen recalled.

By Mr. Freehill:

Q. That item on the bill dated October 28, shipping clerk, $20—what does that represent?

A. That represents his time and expense in making the two trips to Port Newark in handling the shipment of the boat.

Q. Who was the shipping clerk?

A. Al Bauer.

Q. Is he the same person who testified in the case before Judge Woolsey?

A. Yes, sir.

Q. The visit he made at Port Newark was after the damage was reported or after the ship was delayed?

A. No—well, he made a visit after the damage was made and the boat was shipped again and he had to go back again.

Q. Did he accompany the boat from Port Newark to Port Morris?

A. No.

By the Commissioner:

Q. You say he went down to take out bills of lading and to——

A. He went out there originally to accept the shipment and see that it got on the steamer all right and see that the boat was covered over and a good shipment made out of it and—that was in the first place——

[fol. 282] Q. Was the steamer there when the "White City" arrived with the "Drifter"?

A. No, the "White City"—let me tell you the history of the thing?

Q. Yes, I would like to know myself what the situation is—yes.

A. The "White City" came to Morris Heights. It was to be there about 7 o'clock in the morning to get this boat over to the ship in Port Newark about 2 o'clock and the "White City" was late getting out to Morris Heights and got there about 11 o'clock, and when she got over to Newark, in Newark Bay, quite late, say around 5 o'clock, maybe a little earlier, and as she got over there, this steamer that they were to load the ship on went by and they thought that—well, they had missed the steamer, so they tied up at the dock—this man was there (pointing to Mr. Simpson).

By Mr. Freehill:

Q. And then arrived the next morning?

A. Then they stayed there all night.

By the Commissioner:

Q. After he went down to ship the boat, and the steamer was seen going out, who stayed on the yacht?

A. Well, Al Bauer wasn't on the boat at all; he was on the dock where they were to be delivered, waiting for it to come in, and it never came.

Q. Then what did he do?

A. Then he telephoned to New York to find out what had happened to the boat.

Q. Yes?

A. And he didn't find out until I guess—until 9 o'clock. Finally—because these people weren't able to get in touch with the office. The office was closed——

[fol. 283] Q. Then he came back to New York?

A. Then he came back to New York.

Mr. Sullivan: I wish you would establish the status of what this shipping clerk did there.

The Commissioner: I think the witness has described what he did.

Q. You say he went down a second time when the boat was shipped the second time?

A. Yes, sir, when the boat was shipped the second time and got the receipts from the steamship line.

Q. Wouldn't that have been necessary anyway if the yacht had missed the steamer?

A. Not if he hadn't missed the steamer.

Q. Well, the yacht did miss the steamer?

A. Well, it only missed the steamer. They would have received it on the dock.

Q. He wouldn't have had to go down a second time?

A. He wouldn't have had to go down a second time.

Recross-examination.

By Mr. Sullivan:

Q. Now this Bauer held a position in the Consolidated Shipbuilding Company?

A. Yes, sir.

Q. What is his full name?

A. Al—Albert, I think it is.

Q. What date did he go down first?

A. The date that the boat was shipped over there first—towed over.

Q. Towed over by the "White City"?

A. Towed over by the "White City."

Q. That was October 19?

A. It was October 19.

Q. And he went down October 19th and got ahead of the "Drifter" in order——

A. He went right to the pier.

[fol. 284] Q. (Continuing:) In order to make delivery to the purchaser?

A. To the steamship company.

Q. And the purchaser's agreement with you was to make delivery of the boat at Port Newark?

Mr. Freehill: I object to that as immaterial. It's not proper in this case.

Q. Where were you to make delivery of the boat?

A. The boat was delivered at Morris Heights.

Q. But your testimony here is that the shipping clerk went down?

A. That's it.

Q. For what purpose?

A. To take the bill of lading.

Q. That was the place of shipment?

A. Place of shipment.

Q. That's Port Newark?

A. Yes, sir.

Q. What was the name of the boat it was to be shipped on?

A. "Suscalonca".

Q. This Bauer was sent there by your company?

A. Yes.

Q. And if the boat was delivered on the "Suscalonca" on October 19th, he would have taken care of the receipts?

A. Yes, sir.

Q. Showing the delivery of that boat?

A. Yes.

Q. Did he go down on this "Drifter" when the "White City" towed it down?

A. No, sir.

Q. What was the name of your representative on the "Drifter" the day that you sent that——

Mr. Freehill: I object to that as immaterial.
The Commissioner: Let him answer it.

A. A colored man went down.
Q. What is his name?
A. Fred——

[fol. 285] Mr. Freehill: Weston?

A. (Continuing:) Weston—that's right.
Q. Why did he go down?

Mr. Freehill: I object to that.
The Commissioner: Let him answer.

A. To help with the delivery of the boat.
Q. He was on the "Drifter"?
A. Yes.
Q. As it was being towed by the "White City"?
A. I don't know whether he was on the "Drifter" or the "White City."
Q. He started off on the "Drifter," didn't he?
A. I don't know.
Q. Why did he go at all?

The Commissioner: Why are you going into all this?

A. They didn't have sufficient help on the boat to take care of it.
Q. You say it was a custom of your company to send the shipping clerk—this person—to go on the boat to attend that?
A. It was the shipping clerk——

The Commissioner: It's already been answered.

Q. What was the purpose of Weston going there?

Mr. Freehill: I object to that.
The Commissioner: Sustained.
Mr. Sullivan: Exception.

Q. What position did he hold?

[fol. 286] Mr. Freehill: I object to that as immaterial. We are not charging for his services.
The Commissioner: Sustained.

Q. Was Weston a laborer?
A. He was a dock man.

Q. A docking man?
A. Worked down the dock.
Q. And he left with the "White City" and the "Drifter" on October 19, 1925, to go to Port Newark to make delivery of the "Drifter," is that it?

Mr. Freehill: I object to that as immaterial.
The Commissioner: Let him answer.

A. Yes, sir, he did.
Q. How do you classify him—as a laborer?

The Commissioner: That question has already been answered.
Mr. Freehill: I object to it as already answered.
The Commissioner: Sustained; he said he was a dock man.

Q. Is a dock man classified as a laborer?

Mr. Freehill: I object to it as immaterial.
The Commissioner: Let him answer it.
Mr. Freehill: He is trying to lay the basis for an appeal on the interlocutory decree.
Mr. Sullivan: We will stand on that other record. Here is a bill that you want some money for——

Q. Mr. Bolen, what are the names of these laborers for whom you have a bill here for $32?
A. I don't know who the laborers are now.
[fol. 287] Q. Well, will you swear that Weston wasn't one of them?
A. I won't swear, no.
Q. You are the treasurer of the company?
A. I don't—I am ashore.
Q. All this money for these items passed out through you?
A. The men were paid.
Q. Is there any employee of your company in this room that can tell us who these laborers are and what they did for the item of $32?
A. Mr. Christian told you they were men engaged in taking off the equipment of the boat——
Q. He didn't say they were engaged in that. He said laborers did that kind of work. He was specifying possibilities, as what laborers might do. Can you give me the name of one laborer on this $32-item?

Mr. Freehill: He says he doesn't know.

The Commissioner: I won't allow the question.

Mr. Freehill: We rest.

The Commissioner: Do you both rest or do you have some more testimony?

Mr. Sullivan: No, your Honor, I think we have the bulk of the testimony.

Mr. Freehill: I move to strike out the testimony of Alexander Simpson and William Rhodes given in the action entitled Stevens against Simpson in the Municipal Court of the Seventh District, Borough of Manhattan, City of New York, upon the ground that the same is incompetent.

The Commissioner: Motion granted.

Mr. Sullivan: Exception.

[fol. 288] Further hearing at the office of the Commissioner, John L. Galey, Esq., No. 27 William Street, New York City, December 12, 1929.

Present: Mr. Galey, Mr. Sullivan and Mr. Freehill.

Mr. Freehill: I move that the matter be reopened for the purpose of introducing the original charge sheet to comply with the decision in the Spica, 289 Fed. 436, and to take the testimony of the foreman of painters, Mr. Hoabley, there being some question raised by the claimants that the charge for painting was unnecessary and unreasonable.

Mr. Sullivan: We oppose the motion, Mr. Referee. I hand you the papers in opposition (to Mr. Freehill). Give me admission of service.

Mr. Freehill: Sure (signing the papers and returning original to Mr. Sullivan).

Mr. Sullivan makes statement off the record.

The Commissioner: I think I will grant the motion and any of the evidence offered that is immaterial——

Mr. Sullivan: I didn't state it's immaterial. We have been over it.

The Commissioner: I will give them an opportunity to present any new testimony they may have. If it isn't new you may object to it. You have received a notice of hearing and I think I will go on with the hearing as the witnesses are here.

Mr. Freehill: Please let it be noted that the claimant's counsel has withdrawn from the reference although duly served with notice and particularly informed by letter dated December 11, 1929, in addition to the notice signed by the [fol. 289] Referee dated December 5, 1929. I offer in evidence the notice dated December 5, 1929, served upon Florence Sullivan, proctor for claimant, on December 5th, together with letter dated December 11, 1929, addressed to said attorney.

The notice is marked Libellant's Exhibit 1 of this date.

The letter is marked Libellant's Exhibit 2 of this date.

The Commissioner: As it is stated to me that the notice of reference was duly served, and that an affidavit will be filed and this has not been denied by the proctors for the claimant, and the proctors for the claimant have not given any excuse whatever for their refusal to remain at the hearing and the witnesses are here, I think the reference should go on subject to a motion to strike out the testimony if it develops that the notice of reference has not been properly served.

Mr. Freehill: Will you let it be noted that counsel for the claimants, Mr. Sullivan, was duly present at the time of this hearing and has withdrawn from the room.

George Hoabley, being duly sworn and examined as a witness for libellant, testified as follows:

By Mr. Freehill:

Q. What is your address?

A. 527 East 78th St.

Q. By whom are you employed?

A. Consolidated Shipbuilding Company.

Q. Were you employed by that company in October of 1925?

A. Yes, sir.

Q. In what capacity?

A. Foreman painter.

[fol. 290] Q. Foreman of painters?

A. Yes, sir.

Q. Do you remember the yacht "Drifter"?

A. Yes.

Q. Was that repaired at the Consolidated yard in October, 1925?

A. Yes, sir, sometime in October.

Q. Did you have charge of the painters who worked on that boat?

A. Yes, sir.

Q. I show you time cards and material cards signed by you and ask you if they refer to the painting on the yacht "Drifter" (showing witness cards)?

A. These are time cards signed by me.

Q. Will you state the number of hours that painters under your supervision were working on that job? You can refer to the bill if you wish (showing witness bill).

A. 49 hours for the painters.

Q. How many hours did you spend in supervising that work?

A. Four hours of my time.

Q. What was the fair and reasonable charge per hour for painters in October, 1925 at New York City?

A. $1.50 an hour.

Q. What was the fair and reasonable charge for your services as foreman in October, 1925, in New York City?

A. $2.

Q. Will you state briefly just exactly what the painters did in connection with painting the yacht "Drifter"?

A. Well, after the patches were put in we had to clean it up and patch up these new planks and bring them up with three coats of paint and putty up the planks and then we had to give the top sides a coat of white all over and paint the roof and clean up and wash up the engineroom and touch it up with paint.

Q. Did you paint the entire hull?

A. The entire top sides was painted.

[fol. 291] Q. Did you paint the entire hull?

A. Well, some parts of the engineroom.

Q. And was 49 hours work on the part of painters necessary to put that boat in the same condition in which she was?

A. In the original condition.

Q. And was four hours of your time necessary to see that the work was properly carried out?

A. Yes.

Q. What was the fair and reasonable value of the materials used in the painting and cleaning of the boat?

A. Well, on 49—on a contract like that (referring to bill Libellant's Exhibit 2 for Identification) $8.42.

Q. Was that charge fair and reasonable?

A. Yes.

Q. Mr. Hoabley, will you explain briefly how the material cards and time cards that you have identified were made up?

A. Well, these cards are made out by me. I sent the men out on the different jobs in the morning and they make out slips and I make these time cards out the following morning and the material is charged up as is drawn, as the men need the material the material was drawn and charged up against the job.

Q. You are perfectly familiar with the hours that the painters were employed on that particular job?

A. Yes, sir.

Q. Do you sign all of these slips?

A. No, I didn't—the man in the shop signs these.

Q. Is that your signature on the material card?

A. No, sir.

Q. Do you O. K. the charges for materials?

A. Yes.

Q. Did you sign the time cards?

A. Yes, sir, all these time cards were made out and signed by me.

[fol. 292] Q. After they are made out and signed by you, what do you do with those cards?

A. I bring them out to the main office.

By the Commissioner:

Q. Are those the cards for the painters that you are speaking of?

A. Yes, sir.

Mr. Freehill: I will offer in evidence material card for paints and ten time cards made out and signed by this witness.

The cards are marked Libellant's Exhibit 3a to 3k of this date.

Q. In making up the bills, do you know whether these time cards are used at all?

A. They verify them from them cards.

Q. Why was it necessary to paint the hull all the way around?

A. Why, you couldn't make a job out of it no other way. We couldn't patch up—after they put in the new planks you couldn't patch up, it would always show that spot.

Q. You have to paint on both sides of the boat?

A. Yes, sir.

Q. Couldn't you paint one side and leave the other as it was?

A. Well, after the paint is on a couple of weeks like that, after the boat has been finished and that paint that you put on—why it will look whiter than the other.

Q. That would spoil the looks of the boat?

A. Yes, sir.

Q. Was all this painting that you did made necessary by the collision?

A. Yes, sir.

Q. Or the damage which the boat evidence- when she was brought back to the yard was all made necessary by that damage?

A. Yes, sir.

[fol. 293] FELIX D. LEONARD, being duly sworn and examined as a witness for the libellant, testified as follows:

By Mr. Freehill:

Q. Your address?

A. 1333 Marian Avenue, Bronx.

Q. By whom are you employed?

A. Consolidated Shipbuilding Corporation.

Q. What is your position?

A. Cost clerk.

Q. Were you so employed in October, 1925?

A. I was.

Q. What are your duties, Mr.——

A. Making up bills.

Q. I show you several papers and ask you to state what they are (showing witness paper-)?

A. These are the original cost sheets on the job where you make the bills—a duplicate of this is sent to the owner.

Q. Are they taken from the ledger, Mr. Leonard?

A. Taken right from the ledger.

Q. Referring to the sheet on the yacht "Drifter", will you explain how that is made up?

A. Made up from the time cards.

Q. And material cards?

A. And material cards which are sent in under that order number.

Q. Do you dictate this to the stenographer?

A. I do.

Q. And she types it out?

A. Types it out.

Q. After it's typed out, do you compare the sheets with the time cards, material cards and records on that job?

A. Check back.

Q. Did you do that in October, 1925?

A. Always do.

Q. And did it correctly represent the charges and materials used on that job?

A. It did.

[fol. 294] Q. At the cost price?

A. Selling price.

Q. Was this charge sheet made up in the regular course of business?

A. Yes, sir, it was.

Q. And it was your duty to make this sheet up?

A. It was.

Q. Was it made about the time the charges were incurred?

A. At that date, October 28th, the bill was made out.

Q. Is it from this charge sheet that the bill is made up?

A. From that charge sheet the bill is made up, yes.

Mr. Freehill: I offer this sheet from the ledger in evidence.

The Commissioner: That's what you call the cost sheet?

The Witness: Charge sheet.

It is marked Libellant's Exhibit 4 of this date.

By the Commissioner:

Q. This seems to be just a copy of the bill. Is the bill just a transcript of this?

A. The two of them are made at the same time. The two are made at the same time—one the carbon of the other.

See one is over the other and there is a carbon sheet in between.

Q. Do you have any record that you make from day to day of the work done each day on this particular ship?

A. The only record is the time cards.

Q. When do you make up this charge sheet?

A. After the job is finished, might be a few days——

Q. That is made up from the time cards you handed in?

A. From the time cards.

[fol. 295] Q. There are no intermediate records between the time cards and this cost sheet?

A. No, the only record—the only thing we can go by.

By Mr. Freehill:

Q. Are these the checks—I show you these two papers and ask you to state what they are (handing papers to witness)?

A. They are checks for towing.

Q. Towing from where—is that for towing the yacht "Drifter"?

A. This is towing the yacht "Drifter".

Q. From Newark to——

A. Morris Heights.

Q. And then back to——

A. Back to wherever it was—was it Newark—I don't know exactly where.

Q. To whom are they made payable?

A. To the Harlem River Towboat Line, Inc., and the Newton Creek Towing Company.

The Commissioner: Why were these paid by the Consolidated Shipbuilding Corporation?

Mr. Freehill: The reason they were paid by the Consolidated Shipbuilding yard is that they were acting under orders from the owner of the boat through the insurance company.

The Commissioner: Is there anything on record showing a request from the owner of the boat or insurance company to have this towing and these repairs done? I don't remember whether you offered the correspondence on that or not?

Mr. Freehill: I have a letter from the owner dated Octo-

[fol. 296] ber 27th and I think I have also something else

(referring to papers). It has been testified that they were. I know Mr. Bolen testified and I have a letter marked Libellant's Exhibit 7 from Frost, the owner of the boat, to the vice-president of the Consolidated Shipbuilding Corporation.

The Commissioner: Have you offered that in evidence?

Mr. Freehill: Yes, that's marked Libellant's Exhibit 7.

[fol. 297] LIBELLANT'S EXHIBIT 1, OFFERED AT TRIAL MAY 9, 1929

Cable: "Exeellent, New York." Telephone: Sedgwick 7800.

John J. Amory, President; William J. Parslow, Vice-President; Bruce Scrimgeour, Sect. & Genl. Mgr.; William K. Parslow, Treasurer

Designers & Builders of Pleasure and Commercial Craft and Their Propelling Machinery

Speedway Consolidated Shipbuilding Corporation, Morris Heights, New York City, Formerly Gas Engine & Power Company and Charles L. Seabury & Company Consolidated

October 13, 1925.

Mr. Alec Simpson, 151st St. & Hudson River, New York City.

DEAR ALEC: Confirming our telephone conversation of this day, and agreement, please have your work boat "Hilda" here at our works on Monday morning, the 19th, at 6 A. M. to tow 45' launch on cradle from Morris Heights to the Trans Marine Steamship Company, alongside of steamer "Suscolanco" at Port Newark, N. J.

[fol. 298] See Captain Lewis on arrival at pier. It is important that this boat arrive at the steamer before 3 P. M. that same day.

Yours very truly, Consolidated Shipbuilding Corporation. W. A. Ross, Jr., Sales Dept.

WAR:T.

LIBELLANT'S EXHIBIT 4, OFFERED AT TRIAL MAY 9, 1929

About 8:45 A. M.—Weather clear October 20, 1925.

Received from boat "White City" "Drifter", at head of ship with the following damage:—Hole in starboard side amidship about a foot square, Hole from water line extending up feeding (6) planks "store-in"—called Captain's attention to same and also to damage to cradle—which had two up-rights missing and out of line—

(Signed) E. Bauer, in Charge of Shipping "Drifter".

NOTE.—Capt. accepted above receipt without question.

Libellant's Exhibit 2, offered at trial May 9, 1929, identical with Lib. Ex. 3, offered at hearing Oct. 16, 1929, and is printed at page 303.

[fol. 299] CLAIMANTS' EXHIBIT C, OFFERED AT TRIAL MAY 9, 1929

Index No. 8891. 43-2030-27. Year 1926

MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF MAN., 7TH DISTRICT

STEVENS, Plaintiff,

against

SIMPSON, Defendant

Verdict

This case having been tried on Dec. 7 & 8, 1926, before Hon. Jon. R. Davies, Justice, and a jury, the jury rendered a verdict in favor of the *disagreed* for the sum of —.

(Dismissed without costs as to Defendant.)

Motion by Herbert Simpson & Wm. A. Rhodes.

Val. S. Hahn, Clerk.

True copy.

May 8/29.

John F. Plunkett, Clerk. Seal impressed as follows: Municipal Court of New York.

[fol. 300] Endorsed on back as follows: Index No. 8891. Year 1926. Municipal Court of the City of New York, Borough of ——, — District. Stevens, Plaintiff, vs. Simpson, Defendant. Verdict.

[fol. 301] LIBELLANT'S EXHIBIT 1, OFFERED AT HEARING OCTOBER 16, 1929

United States Salvage Association, Inc., 44 Beaver Street

#7898. Hull Damage—Cause and Date Unknown.
Motor Boat "Drifter".

November 4th, 1925.

Report of survey made by the undersigned surveyor of the United States Salvage Association, Inc., on October 21st, 1925, at the request of Messrs. Chubb & Son, on the Motor Boat "Drifter," Mr. F. C. Frost, Owner, while lying afloat at the Consolidated Shipbuilding Corporation, Morris Heights, N. Y., in order to ascertain the nature and extent of damage alleged to have been sustained to Starboard side of hull planking while being towed from Morris Heights to Port Newark—cause and date unknown.

Attending: Messrs. Christen, representing Consolidated Shipbuilding Co.; A. Bauer, representing Consolidated Shipbuilding Co.

The following particulars are extracted from the log:

"October 19th, 1925.—Left Morris Heights 10:45 A. M. in tow of Tug 'White City' of the A. Simpson Towing Com-
[fol. 302] pany bound for S. S. 'Suscolanco' at Port Newark where yacht was to be shipped to Beaumont, Texas.

4:30 P. M. met S. S. 'Suscolanco' coming th-ough draw bridge bound for repair yard, so tied up at Fishers Dock, Bayonne, for the night waiting orders.

October 20th, 1925.—A. M. proceeded arriving at Port Newark 7.35 A. M. On yacht's arrival in Port Newark, Mr. Bauer of the Consolidated Shipbuilding Corporation discovered hole in Starboard side planking at water line amidships.

NOTE.—No other information could be obtained."

43′ Wooden Hull double planked copper fastened inner plank ¼″ outer plank 9/16″ White Cedar.

Found	Recommended
Starboard side amidships at water line.	
1. Four planks broken.	1. To be renewed at butts.
2. Flag pole and socket broken.	2. To be renewed.
3. Band on stem broken.	3. To be renewed.

Notes

(a) Necessary dry docking.

(b) Any removals to effect repairs to be replaced in good order as before.

(c) All paint work to be coated as originally. Repairs to be carried out on a time and material basis.

P. S. Jolly, P. S. Jolly, Surveyor.

PSJ.K.

Libellants' Ex. 2, bearing — Oct. 16th, 1929, in an invoice to T. C. Frost giving the date covering the items set forth at folios 937 to 941 in the report of the Special Commissioner and that said bill was marked "paid".

[fol. 303] Libellant's Exhibit 3, Offered at Hearing October 16, 1929

Telephone: Billings 1213.

Nov. 23, 1925.

New York, Nov. 19, 1925.

M Consolidated Shipbuilding Corp. to Alexander Simpson, Dr.

Boats and launches to let. Boats taken care of and hauled out at reasonable rates. Party launches a specialty to let by the hour or day. Not responsible for boats lost or stolen.

7895

Foot of West 151st Street (Hudson River)

Bill rendered for towing of motor boat "Drifter" from plant at Morris Heights to Port Newark on Oct. 20th, 1925 ..... $75.00

M. & S. Special.
O. K. "Drifter" W. O. R. Paid Dec. 7, 1925. 32855.
9518 N 37.50.
7900 N 37.50.

[fol. 304] Libellant's Exhibit 4, Offered at Hearing October 16, 1929

No. 32855. 10/16/29.

New York, Dec. 8, 1925.

) Consolidated Shipbuilding Corporation

Pay to the Order of Alexander Simpson $75.00. $75 and 00 cts. Dollars.
Cons. S. B. Corp.
To the Corn Exchange Bank, Mount Morris Branch, New York. 32.
B. Scrugener, Terasurer. —— ——, Sec'y.

Countersigned:
William J. P. Arslow, President. —— ——, Vice-President.

Endorsed on the back is the following: Alexander Simpson, Hilda Simpson.

[fol. 305] In United States District Court

[Title omitted]

Claim of Owner

And now Herbert N. Simpson and William Rhodes are the owners of the "White City" intervening for their interest in the said "White City", her engines, etc., and

appear before the honorable Court, and make claim to said "White City", her engines, etc., as the same are attached by the Marshal under process of this Court, at the instance of William Stevens and the said Herbert N. Simpson and William Rhodes aver that they are in possession of the said boat "White City", her engines, etc., at the time of the attachment thereof and that they Herbert N. Simpson and William Rhodes are sole the true and bona fide owners of the said boat "White City", her engines, etc., wherefore they pray to defend accordingly.

Herbert N. Simpson, William A. Rhodes.

Sworn to and subscribed before me this 24th day of June, 1927. Evelyn Myers, Commissioner of Deeds, City of New York, N. Y. Co. Cl'k's No. 76, Reg. No. 28033. Kings Co. Cl'k's No. 123, Reg. No. 8023. Bronx Co. Reg. No. 28010. Commission expires March 9, 1928.

Florence J. Sullivan, Proctor for Claimant, 27 Cedar Street, N. Y. City.

[fol. 306] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

95/265

WILLIAM STEVENS, as Assignee of T. C. Frost, Owner of the Yacht "Drifter", Libellant,

vs.

Steamboat "WHITE CITY", HERBERT N. SIMPSON and WILLIAM A. RHODES, Owners and Claimants

Libel for unexplained damage to the yacht "Drifter" whilst in tow of the "White City" under an agreement for towage from Morris Heights, New York City, to Port Newark, New Jersey

Neil P. Cullom, Esq., by James E. Freehill, Esq., of counsel for libellant.

Florence J. Sullivan, Esq., of counsel for claimants.

OPINION

WOOLSEY, J.:

My decision in this case is for the libellant.

At about 9:30 A. M. on October 9th, 1925, the yacht "Drifter", a fifty-five foot motor boat which had just been completed at the yard of the Consolidated Shipbuilding Corporation, at Morris Heights, was there delivered to the "White City" in pursuance of an agreement made between the owners of the two vessels through authorized [fol. 307] agents, to be towed to the Trans-Marine Pier, at Port Newark, New Jersey, where the "Drifter" was to be shipped on board an ocean going steamship "Suscalanco".

There was also delivered to the "White City" at the same time a cradle in which the "Drifter" was to be stowed on the "Suscalanco's" deck.

The libel herein, which sounds in contract, alleges that the "Drifter" and her cradle were delivered to the "White City" in good condition at Morris Heights and were delivered by the "White City" at Port Newark in a damaged condition.

The answer pleads res adjudicata and alleges that the "Drifter" and her cradle were delivered at Port Newark in the same good condition as when they were received, and that the damage to them, if any, occurred after they had been delivered by the "White City" to employees of the Trans-Marine Company there.

The plea of res adjudicata is based on the fact that there had been a litigation in the Municipal Court, Borough of Manhattan, City of New York, First District, which had been transferred to and tried in the Seventh District, in which William Stevens, the libellant here, as assignee of Frost, had originally commenced an action against Alexander Simpson, the father of Herbert N. Simpson, and had subsequently made the claimants, Herbert N. Simpson and William A. Rhodes, the owners of the "White City" parties thereto.

The issues between the plaintiff and Herbert N. Simpson and William A. Rhodes in the Municipal Court case seem to have been substantial- the same as they are here.

The reason it is claimed that the previous litigations is res adjudicata and should be a bar to this proceeding in

[fol. 308] rem is that the complaint in the Municipal Court in the Seventh District was dismissed without costs as to Herbert N. Simpson and William A. Rhodes.

The claimants' counsel sought to prove his plea of res adjudicata by introducing into the evidence a copy of a printed form captioned with the title of the Municipal Court case, above referred to, and duly certified by the Clerk of the Municipal Court for the Seventh District.

This document has printed opposite the box containing the title of the case the word "Verdict". In the body of the document it is recorded that the case was tried on December 7th and 8th, 1926, before Mr. Justice Joseph R. Davies and a jury, that the jury disagreed, and that the case was "Dismissed without costs as to the defendants, Herbert N. Simpson and William A. Rhodes".

I find that this notation on this document, though somewhat inaptly entered on it, merely records a decision by Mr. Justice Davies dismissing the complaint as against Simpson a. d Rhodes at the trial in which the jury disagreed as to the liability of Alexander Simpson.

I find, therefore, that there is not any proof that any judgment was entered dismissing the case as against Simpson and Rhodes.

It is well settled that the decision or opinion of a Court or the verdict of a jury does not make a matter res adjudicata.

In order to secure that result a judgment must be entered. Reed v. Proprietors of Locks, etc., on Merrimac River, 8 How. 274, 290, 291; Smith v. McCool, 16 Wall. 560, 561; King v. Chase, 15 N. H. 14; Lorillard v. Clyde, 99 N. Y. 196, 200; Springer v. Bien, 128 N. Y. 99, 102.

[fol. 309] The claimants have failed, therefore, to sustain their plea in bar of res adjudicata and it becomes necessary to pass to the merits of the case.

The facts in their essentials are simple and it is unnecessary to discuss the evidence in detail.

The "Drifter" and her cradle which has been delivered to the "White City" in good condition at Morris Heights on the morning or October 19th, 1925, were towed down the East River, across the Upper Bay and through the Kill van Kull.

In the late afternoon, when the flotilla was off Bayonne, the "Suscalanco", on which the "Drifter" and her cradle were to be shipped, was met bound for sea.

The captain of the "White City", Rhodes decided to go ashore and telephone for instructions. He put into Fisher's Dock, Bayonne, and, having received instructions that the "Drifter" could be shipped by a later steamer, decided to spend the night where he was and proceed to Port Newark in the morning.

In the morning of October 20th, the flotilla proceeded to Port Newark and on arrival there it was found that the "Drifter" and her cradle were both damaged.

There is some conflict between the evidence given by the witnesses for the libellant and the claimant Simpson, as to what happened at the Trans-Marine Dock. Rhodes is dead so I have not the benefit of his story. I believe the libellant's witnesses that the "Drifter" and the cradle were damaged when they arrived, that a receipt was given to Rhodes one of the claimants here, now dead, reciting the damage, that he accepted this without protest, and that neither Rhodes nor Simpson could explain when, how or where the damage happened.

[fol. 310] The owners of the "White City" became bailees of the "Drifter" and her cradle on their delivery to the "White City" at Morris Heights. Doherty v. Pennsylvania Railroad Company, 269 Fed. 959, 962, and cases there cited.

When as bailee a towing vessel receives her tow in good condition and delivers it damaged without being able to explain the damage, there is a presumption of negligence on her part and she must be held liable.

This principle has been repeatedly enforced in cases of bailment arising under charter parties. Swenson v. Snore & Triesh, 160 F. 459; Terry & Tench Co., Inc., v. Merritt & Chapman Derrick & Wrecking Co., 168 Fed. 533; Dailey v. Carroll, 248 Fed. 464; O'Brien Bros. v. City of New York, 9 Fed. (2nd) 542, 543.

The interlocutory decree for the libellant, may, therefore, be presented to me for signature.

The libellant may have its costs on entry of final decree.

August 28, 1929.

Woolsey, United States District Judge.

[fol. 311] In United States District Court

William Stevens, Libellant,

against

The Vessel "White City", Her Engines, Tackle, Apparel, etc., Claimant

Interlocutory Decree

This cause having duly come on to be heard on the 9th and 14th days of May, 1929, on the pleadings and proofs adduced by the respective parties hereto, and having been duly argued and submitted by their respective advocates, and due deliberation having been had, and the Court having filed its opinion in writing, in which it found that the libellant was entitled to recover for the damage sustained to the yacht "Drifter", it is hereby

Ordered, Adjudged and Decreed that the libellant herein have, receive and recover of and from the vessel "White City", her engines, tackle, etc., the amount of the damages [fol. 312] sustained by the libellant by reason of the matters and things alleged in the libel and complaint; and it is further

Ordered that it be referred to John L. Galey, Esq., Commissioner to ascertain and compute the amount of libellant's damages and to report thereon to this Court with all convenient speed.

J. M. W., U. S. D. J.

In United States District Court

[Title omitted]

Report of Special Commissioner as to Damages

Report of Special Commissioner as to Damages to the United States District Court for the Southern District of New York

This report is rendered pursuant to an interlocutory decree in this case signed by Judge Woolsey and entered

September 23, 1929, referring the case to me to ascertain and compute the amount of the libellant's damages. [fol. 313] From the testimony offered before me I find that the items of expense in repairing the yacht "Drifter" which the libellant is entitled to include in his damages are as follows:

49 hours painters at $1.50 per hour	$73.50
4 hours painters' foreman at $2 per hour	8.00
2 hours coppersmith at $1.75 per hour	3.50
1 hour electrician at $2 per hour	2.00
94 hours ship's carpenters at $1.50 per hour	141.00
7 hours ship's carpenters' foreman at $2 per hour	14.00
32 hours laborers at $1 per hour	32.00
5 hours pipe fitter at $1.50 per hour	7.50
Paints	8.42
Ship's carpenters' material	99.64
1½ hours power saws at $1.50	2.25
Towage to the repair yard from Newark Bay and return	150.00
Hauling out and launching	35.00
Use of Marine railway for 6 days at $30	180.00
Survey fee	26.00
Total	$782.81

To the sum must be added interest at 6% from December 26, 1925, the date of payment of the repair bill to the date of the final decree.

All these items were included in the bill of the Consolidated Shipbuilding Corporation (the company which effected the repairs) and this bill was paid by the libellant. [fol. 314] I have disallowed the following items in the repair bill:

Shipping clerk	$20.00
Expenses	8.00
Total	$28.00

As the libellant's proof was sharply challenged by the claimant's proctors, it is desirable to state briefly how the libellant's damages were proved.

By the general manager and the cashier of the Consolidated Shipbuilding Corporation it was shown that the

"Drifter", which had been built by that corporation and had been damaged while being delivered to a sea-going vessel at Port Newark for shipment to the purchaser, had been towed back from Port Newark to the yard of the Consolidated Shipbuilding Corporation at Morris Heights, New York, where the damage was repaired before the board was again shipped. The bill for the repairs, which had been executed on a "time and material" basis, contained an itemized statement of the work done and material furnished.

The larger part of the proof offered by the libellant was directed toward establishing the necessity and reasonableness of the charges made by the Shipbuilding Corporation.

The libellant first called a surveyor who had examined the damage on October 22, 1925, and had found four planks broken, a flag-pole and socket broken and a band of stem broken, and had recommended the renewal of these parts, with the necessary drydocking, removals to effect repairs, and repainting. This surveyor testified that the amount of [fol. 315] work described in the bill was reasonably necessary for making good the damage, and that the charges were reasonable in amount. He had not, however, been present at any time during the course of repairs.

By the cashier and cost clerk of the Consolidated Shipbuilding Corporation the libellant proved that the labor employed was reported each day to the office on a separate time card for each workman which was initialed by the foreman. Similarly all materials furnished in connection with the work were reported on material cards signed by the foreman in charge of the particular kind of work for which the material was required or by some one designated by him for that purpose.

It was shown by the cost clerk that at the termination of the job these time cards and material cards were used as the basis for the preparation of a so-called "cost sheet", which was in part a summary of all the time reported as employed in the work (for which a charge was made at the customary rate per hour) and of all the materials mentioned in the material cards, to which had been assigned a sales price. The bill rendered by the Shipbuilding Corporation was in part a transcript of this cost sheet.

The foreman in charge of the painting and the foreman in charge of the carpentry work testified to the accuracy of

the time cards which had been signed in connection with the work in each of their departments respectively. They also offered some testimony as to the correctness of some but not all of the material cards.

The manager of the repair yard was also called to testify that the bill as a whole was reasonable for the work therein described.

[fol. 316] The time cards did not fully cover the labor cost itemized in the cost sheet and bill, the cards marked in evidence showing only 46½ hours spent in painting and 64½ hours in carpenter work. It was, however, proved by the testimony of the cost clerk that the summary in the cost sheet and the bill had been accurately made up from the material cards and time cards which had been turned in, and by the cashier that certain of these material and time cards had been lost, possibly, after being produced at a previous trial in the Municipal Court, in which they were material papers.

In view of this testimony and in the light of the rule established in this Circuit in The Spica, 289 Fed. 436, 441-444, with respect to the nature of documentary testimony required as to cost of repairs, I do not think that the libellant's claim should be disallowed as to the time and materials for which time cards and material cards respectively are not produced or proved. The so-called "cost sheet", taken in connection with the other testimony, is, I think, sufficient under the rule of The Spica, especially as in this case, it is not controverted that the repair bill as proved was in fact paid by the libellant's assignor and the only question is as to the necessity of the repairs and the reasonableness of the charges. In The Spica the repairman was attempting to recover for his services.

The claim for towage of the "Drifter" to and from Port Newark is contested on the ground that the towage from Port Newark back to the plant of the Consolidated Shipbuilding Corporation at Morris Heights was not necessary in order to effect the repairs. There is no proof as to whether repairs could have been accomplished at Port [fol. 317] Newark. In any event, some towage would have been required, and it appears to me to have been reasonable to return the boat, which was new, to her builders for reconditioning rather than to entrust her to another shipyard somewhat nearer the place of the accident. That $75

was a reasonable charge for towing one way between Port Newark and Morris Heights is evidence by the fact that this amount was charged by the claimant for the towage from Morris Heights to Newark, in the course of which the boat was damaged.

Six days is shown to have been a reasonable time for the occupation of the marine railway at the repair yard, and $30 per day was the usual charge for this service. For hauling out and launching $35 is shown to have been the customary charge. These items are therefore allowed as claimed.

The survey fee is allowed as a reasonable expense in connection with a determination of the damage to the vessel and the repairs required.

The item of $20 for services of a shipping clerk is disallowed. The Shipbuilding Corporation sent a clerk to Port Newark to superintend the delivery of the "Drifter" to the steamship company and to obtain bills of lading. When the boat did not ar-ive on October 19, he returned to New York and had to be sent to Port Newark against when the boat was shipped after repairs were made. As appears from the opinion of Judge Woolsey, the "White City" tied up at Fisher's Dock, Bayonne, for the night of October 19 for reasons apparently not connected in any way with the damage. It would therefore have been necessary for the shipping clerk to make two trips to Port Newark in any event. This item was therefore not shown to have been [fol. 318] incurred as a result of the damage to the "Drifter."

The item of expense $8.00, mentioned in the bill, is not substantiated by sufficient proof to make its allowance possible.

As to the items allowed, claimant has not offered any proof to controvert that offered by the libellant indicating that the repairs were required by the accident and that the charges made were reasonable.

As there have been four hearings on the question of damages and the cost of writing out the minutes in full is entirely disproportionate to the amount involved, I have not required the stenographers to transcribe the minutes of the last two hearings. The minutes which have not been transcribed, however, have at all times been and are now available to either party.

The minutes so far as transcribed and the exhibits offered are filed herewith.

Dated New York, N. Y., February 19, 1930.

John L. Galey, Special Commissioner.

[fol. 319] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLAIMANT'S EXCEPTIONS TO COMMISSIONER'S REPORT

The claimant above named hereby excepts to the incompleted report of John L. Galey, Esq., Commissioner as to damages herein, dated February 19th, 1930, and filed herein on or about February 21st, 1930, and the further report made by said Commissioner pursuant to the order made by Mr. Justice Henry W. Goddard, District Judge on March 28th, 1930, and entered herein on the same date, which completed report was made and filed herein on April 21st, 1930, in the following respects:

1. In that the Commissioner allowed as items of libellant's damage the following items and each of them:

49 hours painters at $1.50 per hour	$73.50
4 hours painters' foreman at $2 per hour	8.00
2 hours coppersmith at $1.75 per hour	3.50
1 hour electrician at $2 per hour	2.00
94 hours ship's carpenters at $1.50 per hour	141.00
[fol. 320] 7 hours ship's carpenters' foreman at $2 per hour	14.00
32 hours laborers at $1 per hour	32.00
5 hours pipe fitter at $1.50 per hour	7.50
Paints	8.42
Ship's carpenters' material	99.64
1½ hours power saws at $1.50	2.25
Towage to the repair yard from Newark Bay and return	150.00
Hauling out and launching	35.00
Use of Marine Railway for 6 days at $30	180.00
Survey fee	26.00
Total	$782.81

That the Commissioner in allowing said items and each of them so acted without any evidence or proof thereof and contrary to the evidence and proof advanced before him and contrary to the law and evidence and the weight of evidence.

2. In that the Commissioner allowed interest at 8% from December 26th, 1925, to the date of final decree on the grounds that no such subject-matter was within the jurisdiction of said Commissioner and without any evidence to support said allowance and contrary to the law and evidence and the weight of evidence.

3. In that the Commissioner reported and held that the said bill of items aggregating said $782.81 was paid by the libellant contrary to the law and evidence and weight of evidence.

4. In that the Commissioner's report in stating "how the libellant's damages were proved", disregards the evidence and is contrary to the evidence and the law.

[fol. 321] 5. In that the Commissioner's reports that claimant has not offered any proof to controvert that offered by the libellant contrary to the evidence.

6. In that the Commissioner's conduct of the several hearings as appears from the minutes prevented claimant from having his day in court; prevented claimant from having his necessary and material evidence introduced at the hearings; the Commissioner did not comply with the order appointing him Commissioner and was not impartial and joined the attorneys acting in behalf of libellant to prevent claimant from obtaining the evidence taken before said Commissioner and in this respect deponent begs leave to here refer to the order directing the Commissioner to file as part of his report, the minutes of the last two hearings held by him as appears in said order made March 28th, 1930, and entered herein on the same date and served upon him.

7. In that the acts of the Commissioner disqualified him to so act and that his report is null and void and should be set aside.

8. Claimant refers to and makes part of these exceptions, the exceptions taken on his behalf at the hearings before the Commissioner.

Dated New York, April 25th, 1930.

Florence J. Sullivan, Proctor for Claimant. Office & P. O. address: 505 Fifth Avenue, New York City.

[fol. 322] STATE OF NEW YORK,
County of New York, ss:

Lillian Day, being duly sworn, says that she is the managing clerk in the office of Florence J. Sullivan, proctor for claimant herein; that on the 25th day of April, 1930, at 4:50 o'clock, P. M. she served the within claimant's exceptions to Commissioner's report, upon Neil P. Cullom, Esq., proctor for the libellant, by depositing it in a post office box, at No. 505 Fifth Avenue, Borough of Manhattan, New York City, the same being one of the regular post office boxes of the New York City post office, inclosed in a securely closed post-paid wrapper addressed to said attorney at his office, No. 165 Broadway, Borough of Manhattan, City of New York, that being the address designated by him in the last paper served by him herein.

Lillian Day.

Sworn to before me this 26th day of April, 1930. Margaret Saldini, Notary Public, New York County, No. 16. New York County Register's No. 2S180. Commission expires March 30, 1932.

[fol. 323] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER—March 28, 1930

The claimant herein having moved before me on March 28th, 1930, at a Stated Term of said Court, for an order directing the libellant herein and the Special Commissioner, John L. Galey, Esq., to procure and file with and as part of the report of said Special Commissioner, the

minutes of the last two hearings held by said Special Commissioner and referred to in his incomplete report at page 7 thereof, and that the claimant have such other and further relief as to the Court might seem just.

Now, on reading and filing the notice of motion dated March 20th, 1930, and the affidavit of Florence J. Sullivan, [fol. 324] proctor for the claimant, verified March 20th, 1930, and after hearing Florence J. Sullivan, Proctor for the claimant in support of said motion and Neil P. Cullom, proctor for said libellant (Henry W. Steingarten, Esq., of counsel), and John L. Galey, Esq., said Special Commissioner, in opposition thereto and after due deliberation having been had thereon, it is

Ordered, that the said motion be and the same is hereby granted and that the minutes of said two hearings be returned and filed herein within five (5) days after the filing of the additional bond herein provided for, and on condition that the claimant serve and file with the Clerk of this Court an additional Surety Company bond in the sum of $150.00 for additional costs in this action on or before ten (10) days from the date of this order; and it is further

Ordered, that in the event that said claimant defaults in filing its bond pursuant to the directions contained in this order said motion then and in that event, is denied.

Henry W. Goddard, U. S. D. J.

[fol. 325] In United States District Court

[Title omitted]

Order Resettling and Modifying Decree—April 25, 1930

The motion made on behalf of the claimant in the above entitled action before Mr. Justice Alfred C. Coxe, District Judge, at his Chambers on April 25th, 1930, at 10 A. M., for an order vacating and setting aside the order made herein on the 12th day of April, 1930, and entered on April 14th, 1930, in the office of the Clerk of said Court and for such other and further relief as to the Court might seem just.

Now, on motion of Florence J. Sullivan, proctor for the claimant, who reads the notice of motion returnable on said 25th day of April, 1930, and the affidavit of Florence J. Sullivan, proctor for the claimant verified the 23rd day of April, 1930, in favor of said motion and Neil P. Cullom, [fol. 326] proctor for the libellant (Henry W. Steingarten, of counsel), in opposition thereto and on due consideration and on the memoranda of Mr. Justice Coxe, now on motion of Florence J. Sullivan, proctor for the claimant, it is hereby,

Ordered, that the decree signed by Mr. Justice Alfred C. Coxe, on the 12th day of April, 1930, and entered in the office of the Clerk of said Court on April 14th, 1930, be and the same is hereby resettled and modified to the extent of striking out the provision limiting the time of the claimant to appeal in ten days after service of a copy of said decree with notice of entry, upon the claimant or his proctor, and inserting therein thirty days from April 18th, 1930, as the time within which the claimant is to appeal.

Alfred C. Coxe, U. S. D. J.

[fol. 327] IN U. S. DISTRICT COURT

[Title omitted]

NOTICE OF SETTLEMENT OF DECREE

SIR: Please take notice that the within decree will be presented for settlement and signature to the Clerk of this Court on March 29, 1930, at ten o'clock in the forenoon.

Dated New York, March 27, 1930.

Yours, etc., Neil P. Cullom, Proctor for Libellant. Office & P. O. Address: No. 165 Broadway, Borough of Manhattan, City of New York.

To Florence J. Sullivan, Esq., Proctor for Claimant, 505 Fifth Avenue, New York City.

[fol. 328] IN UNITED STATES DISTRICT COURT

WILLIAM STEVENS, Libellant,

against

The Vessel "WHITE CITY", Her Engines, Tackle, Apparel, etc., Claimant

DECREE—April 12, 1930

This cause having been heard on the pleadings and proofs and having been argued and submitted by the advocates for the respective parties, and due deliberation having been had thereon, and the Court having rendered its decision holding the S. S. "White City" solely at fault for the damages set forth in the libel, and the interlocutory decree having been entered herein on the 23rd day of September, 1929, and the Court in said interlocutory decree having appointed John L. Galey, Esq., Special Commissioner to ascertain and compute the amount of libellant's damages and to report thereon to this Court, and said Special Commissioner having duly heard the proofs and filed his report herein on the 21st day of February, 1930, and [fol. 329] the libellant's damages having been assessed at $782.81, and due notice having been served upon the proctor for the claimant herein of the filing of said report, and no exceptions having been taken thereto and said report having been affirmed by order of Judge Bondy dated March 22, 1930, now on motion of Neil P. Cullom, proctor for libellant, it is

Ordered, adjudged and decreed that the libellant recover of and from the S. S. "White City", its claimant and stipulators, the sum of $782.81, with interest thereon from December 26, 1925, to the date of this decree, amounting to $199.34, together with the libellant's costs as taxed, amounting to $428.20 making a total of $1,410.35 with interest thereon until paid, and that the S. S. "White City", her engines, boilers, etc., be condemned therefor, and it is further

Ordered, adjudged and decreed that unless this decree be satisfied or an appeal be taken within ten days after service of a copy of this decree, with notice of entry, upon the claimant or his proctor, execution shall issue against

the S. S. "White City", its claimant and stipulators, for value on their goods, chattels and lands to satisfy this decree.

Alfred C. Coxe, U. S. D. J.

[fol. 330] IN U. S. DISTRICT COURT

[Title omitted]

AFFIDAVIT OF MAURICE J. SMITH

STATE OF NEW YORK,
County of New York, ss:

Maurice J. Smith, being duly sworn, deposes and says: That on the 27th day of March, 1930, he served a true copy of the within proposed final decree with notice of settlement on the proctor for the claimant herein by delivering to and leaving the same on the desk of the managing clerk at the offices of said proctor for the claimant at 565 Fifth Avenue, Borough of Manhattan, City of New York, there being no one present there to receive said final decree. The proposed final decree annexed was noticed for settlement for March 29, 1930 at 10 o'clock in the forenoon of said date. Deponent on March 29, 1930 at 10 o'clock submitted the annexed decree to the Clerk of this Court. Deponent taxed the bill of costs at the same time in the amount of $428.20 which is entered in the docket book of Admiralty in book 95, page 436. Subsequently deponent inquired from the Clerk of this Court whether or not the final decree beforementioned had been signed and was informed by the Clerk that it had not. Whereupon [fol. 331] deponent made diligent search through records of this Court and through docket books which might contain an entry of said order, without success. Deponent then inquired from the secretaries of the different judges of the Admiralty term of this Court, to ascertain whether or not any of them were holding said decree but was informed by said secretaries that no such decree was in their hands at that time. On the date that this decree was noticed for settlement there was no appearance by the proctor for the claimant to object as to any of the items men-

tioned in the bill of costs nor to submit any proposed decree in opposition to the one before this Court.

From the foregoing it is evident that this decree through inadvertence or mistake has been lost in the papers of this Court.

Wherefore it is respectfully requested that this Court waive service of a copy of this decree upon the proctor for the claimant on the grounds that said decree was timely served upon said claimant's proctor and said proctor never appeared to submit in opposition.

Maurice J. Smith.

Sworn to before me this 11th day of April, 1930. Herman Donn, Notary Public, Kings County. Kings Co. Cl'k's No. 452, Reg. No. 1223. N. Y. Co. Cl'k's No. 651, Reg. No. 1D491. Bronx Co. Cl'k's No. 49, Reg. No. 3136A. Commission expires March 30, 1931.

[fol. 332] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

SIRS: Please take notice that the claimant hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from the final decree entered in the above entitled cause in the office of the Clerk of this Court on the 14th day of April, 1930, and from each and every part of said final decree, and the claimant intends to bring up for a review said final decree, interlocutory decree, the exceptions in the case, the report of the Special Commissioner and the exceptions filed thereto.

Dated New York City, May 15th, 1930.

Yours, etc., Florence J. Sullivan, Proctor for Claimant, the Vessel "White City", Her Engines, Tackle, Apparel, etc. Office & P. O. address: 505 Fifth Avenue, New York City.

[fol. 333] To Alexander Gilchrist, Jr., Esq., Clerk of the United States District Court for the Southern District of New York; Neil P. Cullom, Esq., Proctor for Libellant,

William Stevens. Office & P. O. address: 165 Broadway, New York City.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

The vessel "White City", her engines, etc., claimant, hereby assigns error in the opinion, findings and decree of the District Court (Admiralty Term) for the Southern District of New York, as follows:

[fol. 334] 1. In that the Court found the vessel "White City" at fault in towing the vessel, the "Drifter" and her cradle from Morris Heights on the East River, across the Upper New York Bay, through Kill van Kull to Port Newark, N. J.

2. In that the Court found that the "Drifter" was delivered to the "White City" by the Consolidated Shipbuilding Corporation at Morris Heights on October 19th, 1925, in pursuance of an arrangement made between the owners of the two vessels, through authorized agents, to be towed to the Trans-Marine Pier at Port Newark, N. J.

3. In that the Court found that the cradle of the "Drifter" was delivered to the "White City" at the same time and place (October 19th, 1925, at 9:30 A. M.).

4. In that the Court found that the "Drifter" and her cradle were delivered to the "White City" in good condition at Morris Heights and were delivered at Port Newark in a damaged condition.

5. In that the Court failed to find that the "Drifter" and her cradle were not delivered to the "White City."

6. In that the Court failed to find that the "White City" was not a tow boat—that it was a small excursion boat temporary detached from its regular service and employed by the Consolidated Shipbuilding Corporation at the urgent and special instance and request of said corporation.

[fol. 335] 7. In that the Court failed to find that the Consolidated Shipbuilding Corporation never parted with the possession of the "Drifter" and its cradle from October 19th, 1925, at 9:30 A. M. to the time they were delivered to Port Newark to the Trans-Marine Pier.

8. That the "White City" was an employee of the Consolidated Shipbuilding Corporation on October 19th, 1925, and during the entire voyage and towing by the "White City" of said "Drifter" and her cradle.

9. In that the Court failed to find that the said towing of the "Drifter" and its cradle was the act of the Consolidated Shipbuilding Corporation that was in full possession and directed the said towing of said "Drifter" and its cradle from Morris Heights to the Trans-Marine Pier at Port Newark, N. J., from the beginning of the tow from 9:30 A. M. on October 19th, 1925, to the ending of said tow.

10. In that the Court failed to find that a regular employee of the Consolidated Shipbuilding Corporation was placed in the "Drifter" to direct and control the said tow.

11. In that the Court failed to find that a regular employee of said Consolidated Shipbuilding Corporation so placed in control of said tow, abandoned the "Drifter" and its cradle during said voyage leaving the tow insufficiently manned and controlled.

[fol. 336] 12. In that the Court failed to find the breach of duty and neglect against the Consolidated Shipbuilding Corporation that was in charge of said tow by reason of its regular employee deserting said tow in the course of the voyage and before the point of destination was reached.

13. In that the Court failed to find that the damage to the "Drifter" was occasioned after it had been delivered to the point of destination and delivered to the Trans-Marine Pier at Newark, N. J.

14. In that the Court failed to find that if any damage was sustained by the "Drifter" in course of the tow and voyage, that the same resulted from the "perils of the sea" not chargeable to the "White City".

15. In that the Court failed to find that if said "Drifter" sustained any damage during the tow and voyage it was oc-

casioned through "drift-wood" and other obstacles and obstructions in the navigable water through which the tow passed and over which the "White City" had no control.

16. In that the Court failed to find that it was an act of neglect on the part of the Consolidated Shipbuilding Corporation and libellant's assignor to cause or permit such tow, exposing the "Drifter", a frail boat, to the perils of the sea.

17. In that the Court failed to find that the action brought on the same subject-matter and between the same parties for the same damage had been previously brought in the Municipal Court, Borough of Manhattan, City of New York, [fol. 337] First District, and transferred and tried in the Seventh District, and resulted in a decision, order and judgment therein, freeing the owners of the "White City", Herbert Simpson and William A. Rhodes, from all blame and damage to said "Drifter" arising from said tow and that said Municipal Court action, decision, order and judgment were a bar against bringing the above entitled action and constituted an effective plea of res adjudicata.

18. In that the Court failed to find that said Municipal Court action was still pending against Alexander Simpson and barred the above entitled action.

19. In that the Court failed to admit the testimony of William A. Rhodes and Alexander Simpson in the trial of the above entitled action taken at the trial in said Municipal Court and who died before the trial of the above entitled action and which testimony and evidence was competent, necessary and material for the defense of the "White City".

20. In that the Court failed to admit the papers and record of said Municipal Court action at the trial of the above entitled action.

21. In that the Court assumed jurisdiction of the parties and subject-matter in the above entitled action.

22. In that the Court refused to dismiss the above entitled action and remand the parties back to the State and City Courts of the City of New York.

23. In that the Court failed to give force and effect to the [fol. 338] evidence submitted at the trial and contrary to

the law, evidence and conceded facts, held that when the towing vessel receives her tow in good condition and delivers it damaged without being able to explain the damage it becomes a bailee and that there is a presumption of negligence on her part and she must be held liable.

24. In that the Court failed to find that the "White City" delivered the "Drifter" to the point of destination in good condition.

25. In that the Court failed to dismiss the libel at the close of the trial.

26. In that the Court without evidence to support its finding and contrary to the evidence and the weight of evidence and the law in such case made and provided, directed and granted an interlocutory decree in favor of the libellant and against the claimant with costs and appointed a Commissioner to ascertain and compute the amount of the libellant's damage.

27. In that the Commissioner appoined in the interlocutory decree after his appointment and during the pendency of his commission appeared in behalf of the libellant and in opposition to claimant's motion to have the report of the Commissioner made complete and correct.

28. In that the Commissioner allowed interest on the claim of damage of libellant.

29. In that the evidence before the Commissioner was insufficient to prove the damage he allowed and such damage is against the evidence and the weight of evidence and contrary to the law.

Florence J. Sullivan, Proctor for Claimant.

[fol. 339] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

The claimant, the vessel "White City", her engines, tackle, apparel, etc., being aggrieved by the decision in the United States District Court, Southern District of New

York, Admiralty Term, filed herein and by the final decree entered thereon in the office of the Clerk of this Court on the 14th day of April, 1930, and the report of the Special Commissioner as to the damages, hereby prays that an appeal be allowed in the United States Circuit Court of Appeals for the Second Circuit.

Dated New York City, May 15th, 1930.

The Vessel "White City", her Engines, Tackle, Apparel, etc., Claimant, by Florence J. Sullivan, Proctor. Office & P. O. address: 505 Fifth Avenue, Borough of Manhattan, New York City.

[fol. 340] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

Upon the foregoing petition, it is

Ordered that the apparel herein prayed for by the claimant, the vessel "White City", her engines, tackle, apparel, etc., and the same is hereby allowed.

Dated New York City, May 15th, 1930.

John M. Woolsey, U. S. D. J.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING CASE

The foregoing case having been settled before me, it is hereby

Ordered that said case consisting of two volumes be and is hereby settled and ordered filed in the office of the Clerk of the United States District Court of the Southern District of New York.

Dated New York, Dec. 8, 1930.

Alfred C. Coxe, U. S. D. J.

ORDER FILING RECORD IN THE UNITED STATES CIRCUIT COURT OF APPEALS

Pursuant to the Practice in such case made and provided, it is hereby

Ordered that the foregoing printed case consisting of two volumes on appeal be filed in the office of the Clerk of the United States Circuit Court of Appeals for the 2nd Circuit.

Dated New York, Dec. 8, 1930.

Alfred C. Coxe, U. S. D. J.

[fol. 341] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE EXHIBITS

It is hereby stipulated and agreed by and between the attorneys for the parties above named, that the following exhibits introduced in the above action, need not be printed in the record on appeal, but that they and copies thereof, as well as the originals of the exhibits printed in the record, may be handed up to the Court by either party and referred to upon the argument of the appeal herein as if printed in the record:

* * * * * * *

[fol. 342] Dated New York, October —, 1930.

——, Attorney for Claimant-Appellant.

——, Attorney for Libellant-Appellee.

[fol. 343] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated New York, October —, 1930.

——, Attorney for Claimant-Appellant.

——, Attorney for Libellant-Appellee.

[fol. 344] Clerk's certificate omitted in printing.

[fol. 345] LIBELLANT'S EXHIBIT D

This Exhibit consists of an assignment made by T. C. Frost to William Stevens, libellant prior to the institution of this action and it was duly acknowledged and that the assignment stated that it was made for valuable consideration.

CLAIMANT'S EXHIBITS F AND G

These Exhibits were the Bills of Sale of the boat, "White City," to William A. Rhodes and Herbert Simpson.

CLAIMANT'S EXHIBIT H, MARKED FOR IDENTIFICATION

This Exhibit was received and marked Claimant's Exhibit H for Identification and consists of the testimony of Alexander Simpson, deceased, and William A. Rhodes, deceased, in the Municipal Court, both of whom died before the action was tried in the United States District Court.

The testimony of said Alexander Simpson and said William A. Rhodes in the Municipal Court is as follows:

Wednesday, December 8th, 1926.

Alexander Simpson, one of the defendants, called on behalf of the defendants, having been first duly sworn, testified as follows:

By the Court:

Q. Your name and your address?
A. Alexander Simpson.

[fol. 346] Direct examination.

By Defendants' Counsel:

Q. Are you Alexander Simpson, one of the defendants in this action?
A. Yes, sir.
Q. What is your business?
A. I am in the boat business.
Q. Where are you located?

A. 151st Street and North River.

Q. Do you know the Consolidated Shipbuilding Corporation?

A. Yes, sir.

Q. Their place of business?

A. Yes, sir.

Q. Have you had dealings with them?

A. Yes, sir.

Q. Before October 19th, 1925?

A. Yes, sir.

Q. And some business after October, 1925?

A. Yes, sir.

Q. Do you know Mr. William A. Roos?

A. Yes, sir.

Q. Do you know William A. Roos, connected with the Consolidated Shipbuilding Corporation?

A. Yes, sir.

Q. The witness who testified here yesterday?

A. Yes, sir.

Q. On or about October 13th, 1925, did he telephone to you from the Consolidated Shipbuilding Corporation?

A. Yes.

Q. Did you have some talk?

A. Yes.

Q. About conveying this boat "Drifter"?

A. Yes.

Q. Now, will you tell the Court and jury what conversation you had?

A. I talked to him over the 'phone.

Q. Over the 'phone?

A. Yes.

Q. Will you tell the jury so that they can understand and hear you?

A. Well, he called up and asked me to tow this boat to [fol. 347] Port Newark, and I was to tow it with one of my boats, but something happened to the boat and I couldn't take it.

Q. What is the name of your boat?

A. The "Lady Hilda the 2nd." So I can't tow it.

By the Court:

Q. That is what you said to him?

A. That is what I said to him, yes, sir; and he says,

"Well, why don't you let the boys tow it?" I says, "All right." So the boys that owns the "White City" has sent her over there; they took her over.

Q. Now, you are getting ahead of the story. Tell us all the conversation that you had.

A. Well, that is the conversation. The boat was broke down; she couldn't go.

Q. No; you told them that? You told them all this?

A. Yes.

Q. What did you say to them? That is what we want to know.

A. Well, first off, when he first called, I said I would do the job with the "Hilda the 2nd," and then later on I told him I couldn't; that something broke down on her and I couldn't use it, and he said, "All right; let the boys——"

Plaintiff's Counsel: Fix the time.

A. (Continuing:) Well, the boys did the job, and I said, "All right"; and so the boys owns the "White City," and that is the boat that went to do the job.

By Defendants' Counsel:

Q. Now, was there anything said between you and Mr. Roos as to the danger of taking it down on the 19th of October, and the advisability of taking it?

[fol. 348] A. Well, I advised Mr. Roos to let us take it over to our place the day before.

Plaintiff's Counsel: I object to that.

By the Court:

Q. Do not say "advised." What did you say to him?

A. I said to him that, "Let's take the boat over to my place" the day before.

Objected to.

By Defendants' Counsel:

Q. Tell us what you said to him.

A. And I said I would take it over to my place and leave it over there over night, and take it down the next morning, if the conditions would be right. Well, he said, "No, you can't do that. You must take it the day you are going to take it to Port Newark."

Q. What conditions did you refer to?
A. The tide.

The Court: What did you say?

Q. What did you say about the tide?
A. Well, I said the tide would be in our favor in the morning early to take it from our place if I got it the day before.
Q. On what date?
A. That would be on the 18th.
Q. I suppose the jury knows about the tides, but will you tell us so I will have it on the record?
A. If you have a tide against you, it is very hard pulling, and you get all the drift-wood against you; you are forcing up against the drift-wood the conditions is against you all the way.

[fol. 349] The Court: You said this to him?

Q. That is what you said to Mr. Roos?
A. That is what I said to Mr. Roos.
Q. The tide——
A. The tide runs about four or five miles an hour at times.
Q. Do you mean that on the 19th you would be going against the tide?

The Court: The point is that he says that he told him that.

Q. This was when Mr. Roos called you up on the 'phone, and you first told him you could do it, and then you found that the "Hilda 2nd" was out of order, and you called him back and you had this conversation?
A. Yes, sir.

The Court: Do not let us go over that.

Q. That was before the "Drifter" was taken down to Port Newark?
A. Yes, sir.
Q. Well, now, explain, if you please, to the jury in reference to the tide on the 18th of October and the tide on the 19th?

Objected to.
Sustained.

Q. What did you say in respect to the drift-wood and the tide being against you?

Objected to on the ground of repetition.

Sustained.

Q. Will you explain to the jury what you mean by drift-wood?

[fol. 350] Objected to. Sustained.

Q. I show you a paper and ask you to look at that (showing)? You received a letter from the Consolidated Shipbuilding Corporation after talking with Mr. Roos?

A. Yes, sir.

Q. You are the Alexander Simpson referred to there?

A. Yes.

Q. It is your boat, the "Hilda 2nd," that they first wanted?

A. Yes.

Q. You found that it was out of order, and you turned it over to William A. Rhodes and Herbert Simpson?

Objected to. Colloquy.

Defendants' Counsel: Well, I offer it so there will not be any misunderstanding. I offer the bottom part in lead pencil in evidence, too.

Objected to; sustained.

Q. How long have you been in the boat business, Mr. Simpson?

A. I have been in about twenty-eight years, six for myself.

Q. Are you familiar with the waters and floatwood in the Harlem River?

A. Yes, sir.

Q. And in the New York Bay and in the waters about New York—the Hudson River?

A. Yes, sir.

Q. For this period of time?

A. Yes.

Q. And you frequently found heavy logs and driftwood in the water?

A. Yes, sir.

Q. Has that been constant during all that time, and is it constant day and night all the time?

A. Yes.

Q. Has the City of New York a department——

Plaintiff's Counsel: I object to that.

[fol. 351] Q. (Continuing:) To gather in this drift-wood and these logs?

A. The War Department has a big lighter that goes around and picks them up.

Q. Will you describe to the jury the different sizes, appearances and the manner of floating of this drift-wood?

Objected to.

A. Sometimes you will get a stout one going down with the drift, and sometimes you will get half of a beam going down with the drift.

Plaintiff's Counsel: I object to that.

By the Court:

Q. There is liable to be anything going down?

A. Sure, there is liable to be anything going down.

Colloquy.

By Defendants' Counsel:

Q. Well, you have seen them?

A. I have, yes, sir.

Q. The people gather them in?

A. They don't have to buy no firewood.

Q. They do not have to buy any firewood?

A. No.

Q. You have heard the description of the injury to this boat, the "Drifter," described here, about the waterline?

A. Yes, sir.

Q. And this that we speak of, would that cause that damage?

A. Of course it would, yes.

Objected to. Colloquy.

[fol. 352] Q. Will you describe that drift-wood and those large logs that you speak of?

A. Well, the logs, sometimes they have got spikes in them; sometimes they have got bolts in them. They are

apt to have anything in them; and that boat from the department is supposed to pick it up, but they can't pick it all.

Q. And you have seen them over this period?

A. Yes, sir.

Q. You live near the edge of the water and you know?

A. Yes.

Q. And if the "Drifter" was being conveyed out against the tide and the floating logs and wood coming against it, would that increase the danger?

A. That would do the damage.

Plaintiff's Counsel: I move to strike it out.

Q. You suggested that they deliver the boat "Drifter" referred to from Morris Heights to Port Newark at a time when the tide was going out, is that right?

Objected to; sustained.

Q. Now, there is testimony here that you heard, no doubt, that the "Drifter" was damaged and that there were certain repairs made, and that the testimony was to the effect that those repairs were made by the Consolidated Shipbuilding Corporation? You heard that testimony?

A. Yes.

Q. Now, before those repairs were made did the Consolidated Shipbuilding Corporation tell you about it, or was it after they were made that they sent a bill?

[fol. 353] A. Well, I couldn't say; I can't say to that whether they did or not.

Q. Did they notify you to be present, to come over and look at it?

A. I don't think so.

By the Court:

Q. Well, do not say that you do not think so. Would you say that you were not?

A. No, I wasn't present.

Q. No, but were you notified?

A. I am not sure about it, whether I was or not. I don't think I was.

By Defendants' Counsel:

Q. Well, they do not claim you were there?
A. I don't think I was there.

Plaintiff's Counsel: Wait a minute——

Q. There is no evidence that you were, but just tell us the facts.

Plaintiff's Counsel: Do not suggest the testimony.

Q. Were you there——
A. No, sir.
Q. Before the repairs were made?
A. No, sir.

Objected to.

Q. Did they ever ask you to have any bids made for this repair work?
A. No, sir.
Q. And the first that you heard of the claim for damage was after the repairs were made?
A. Absolutely; after.

[fol. 354] Plaintiff's Counsel: Objected to. The witness has already answered that he does not know.
The Court: He says he heard of it afterwards.

Q. I say, the Consolidated Shipbuilding Corporation did not send you word until after the Consolidated Shipbuilding Corporation had made their own repairs on their own boat, the "Drifter"?

Objected to; sustained.

Defendants' Counsel: You have the witness.

Cross-examination.

By Plaintiff's Counsel:

Q. Mr. Simpson, you made that contract and you turned it over to your boys? Is that what you did?
A. No, I didn't turn it over to the boys. I made—I agreed to tow the boat for Mr. Roos by the "Hilda the 2nd," and she was out of order and he said, "Why not let the boys do it?" I said, "All right"; and so the boys went over and done it.

Q. Just a minute. When did you call up Mr. Roos, as you testified, to tell him that—

A. I think it was the day before the job was done.

Q. What date was that?

A. I think it was the 18th.

Q. I beg your pardon; I didn't hear it?

A. It may have been the 18th.

Q. It may have been the 18th, but you are not sure?

A. It was somewhere around there, before the job was done. I called him up first, and I told him my boat was out of commission.

Q. Are you sure that you called him at all?

A. Yes, sir.

[fol. 355] Q. I show you this check, Plaintiff's Exhibit No. 5, and ask you whether you endorsed it (showing)?

A. Yes, I endorsed the check.

By Defendants' Counsel:

Q. What date did you endorse it?

By Plaintiff's Counsel:

Q. What date did you endorse it?

A. They made the check out to me. I had to get the money for the boys, didn't I?

Plaintiff's Counsel moves to strike out answer.

Q. What date did you endorse that check?

A. I don't know; I couldn't tell you. The check shows for itself.

Defendants' Counsel objects.

A. (Continuing:) I endorsed it; I don't know.

By the Court:

Q. But do you say that it is that date?

A. Yes, sir.

Q. You do not know of any other date?

A. No.

By Plaintiff's Counsel:

Q. Will you state to the Court and the jury the substance of that second conversation with Mr. Roos?

A. Well, I told Mr. Roos that the "Hilda the 2nd" was broke down and I couldn't do the job. "Well," he says, "Why not let the boys do the job?" I said, "All right."

[fol. 356] Q. And yet——

A. They did the job with the "White City."

Q. And yet despite that fact?

A. And not my boat.

Q. And yet despite that conversation you received a letter from Mr. Roos directed to you and confirming the first conversation?

A. I received a letter for to get the boat.

Plaintiff's Counsel: I object to that letter. Colloquy.

Q. Will you answer the question?

A. Will you repeat the question?

Question repeated.

Q. You did not send any letter to Mr. Roos, did you?

A. No, I didn't.

Q. Stating that you had sublet that contract to somebody else?

A. I didn't sublet any contract.

Q. But yet you endorsed that check in payment, did you?

A. I endorsed the check. I said I endorsed it.

Q. I show you this bill, Plaintiff's Exhibit No. 4, and ask you whether that is your bill (showing)?

A. That is my billhead.

Q. All right. Do you mean to tell the Court and jury that you turned the job over to your two boys, and yet you endorsed the bill (check?), and sent out a bill to the Consolidated Shipbuilding Corporation?

A. I didn't send out any bill.

Q. Answer yes or no.

A. No.

Q. Who has control of these billheads in your shop? Who has got charge of them?

A. Charge of the billheads?

[fol. 357] Q. Yes.

A. Why, I own the billheads.

Q. Well, how did they get into anybody's hands except that of the Consolidated Shipbuilding Corporation? Were they stolen?

A. I couldn't tell you that.

Q. Was this billhead stolen and sent to the Consolidated Shipbuilding Corporation?

A. No, I don't think so.

Q. Whose handwriting is that on this bill?

A. I don't know.

Q. You say that this money was turned over to your boys, do you?

A. Yes, sir, every Saturday.

Q. Who is the second endorser on this check?

A. That is my wife.

Q. Answer that question again, please?

A. My wife.

Q. Mr. Simpson, what time were you supposed to have that boat at the Consolidated Shipbuilding Corporation in accordance with the terms of that contract of October 13th?

A. I couldn't tell you.

Objected to.

The Court: He says he does not know.

Q. I will read to you the first part of Plaintiff's Exhibit No. 3: "Confirming——"

Objected to; colloquy.

Q. What time did you have a boat there at the Consolidated Shipbuilding Company?

A. I didn't have any.

Q. Didn't you testify that the tides would be with you early in the morning on the 19th?

Objected to. Overruled.

[fol. 358] Q. Go ahead, Mr. Simpson.

By the Court:

Q. Did you say to Mr. Roos that the tides would be with you on the morning of the 19th? That is the question.

A. Why, I am not quite sure about that.

By Plaintiff's Counsel:

Q. Then do you want to change your testimony on that point?

A. No, I don't want to change anything. You are trying to pin something on me that ain't entitled to me. You are trying to put something on my shoulder.

Q. No, I am not. Will you answer that question.

Court admonishes witness.

Q. Will you answer that?

A. I told Mr. Roos that I wanted the boat the day before, so I could take it in my place and get an early start in the morning; if I had done the job myself——

Q. Then this statement here of Mr. Roos to have the "Hilda" at 6 A. M., to tow forty-five foot launch coincides with your instructions, doesn't it?

Objected to. Overruled.

Q. Will you answer that question?

A. I asked Mr. Roos to take it on the 18th around to my place and leave it there, and start with it——

Q. No; just answer that question.

Argument.

[fol. 359] Q. If you had performed this contract and had been there at six o'clock, the tides would have been with you on the 19th, wouldn't they?

The Court: You mean in accordance with the letter?

Q. Yes, in accordance with the letter; would the tides have been with you or would they not?

A. I don't know.

Q. Isn't it a fact that on the morning of the 19th of October you got several telephone calls from Mr. Roos asking you whether the boat was not there?

A. I don't remember.

Q. You do not remember those telephone calls?

A. No, I don't think there was any, to be truthful about it.

Q. You say you did not know what the tides would be on the morning of the 19th, at 6 A. M.?

A. No, I couldn't tell you.

Q. What would have been the tides on the 20th?

A. I couldn't tell you. It would be an hour later.

Q. Or on the 21st?

A. Two hours later.

Q. But you just now said that you did not know what the tides would be on the 19th?

A. You were asking me the different days. It is an hour later.

Q. What makes you so sure about the tides on the 18th?

A. Well, the tides aren't always the same in the Hudson River and the Harlem River; they are different tides.

Q. This boat went down to Harlem, do you know that?

A. I don't know where she went. I couldn't tell you anything about it. I didn't see it.

Q. You are a river man, aren't you, Mr. Simpson?

A. Yes.

[fol. 360] Q. You know the river pretty well?

A. Fairly good.

Q. Then you know that drift-wood is apt to be encountered?

A. Oh, yes.

Q. When you made that contract, it was with the knowledge that you might encounter drift-wood on the way down?

A. I didn't make any contract.

Objected to.

The Court: He has answered that he did not make any contract.

The Witness: I wasn't there. I don't know anything about it.

Q. Do you deny the conversation on October 13th with Mr. Roos with reference to the towage of the boat "Drifter"?

Objected to.

Q. Did you receive that confirmatory letter of October 13th, Plaintiff's Exhibit No. 3?

Objected to.

The Court: Did you receive that letter?

Q. Did you receive that letter on October 13th?

A. I don't know what date I did receive it.

Q. But you did receive it?

A. I received a letter to deliver the boat.

Q. You did not make any objection to the receipt of that letter, did you, to Mr. Roos?

A. No, Mr. Roos knew that I wasn't going to do the job.

The Court: Strike it out.

[fol. 361] By the Court:

Q. You did not call him up with reference to the letter afterwards, did you?

A. I don't know whether it was after or before.

Plaintiff's Counsel: Just a minute.

A. (Continuing:) I called him up and told him I couldn't do the job and my boat was out of order. "Well," he said, "Let the boys do the job."

By Plaintiff's Counsel:

Q. About what date did you call him?

A. I think that was on the 18th.

Q. Wasn't it before the 19th?

A. Either a day or two before. I am not quite sure.

Q. That was five days after the receipt of this letter of October 13th?

Defendants' Counsel: I object to that, the computation.

Q. Answer yes or no?

A. I don't know just exactly what day that I called him up. It was either one or two days before. He knew that I couldn't do the job.

Q. Just one more question, Mr. Simpson. When did you first discover the damage to the motorboat?

A. I never saw the "Drifter." I don't know anything about any damage.

Q. When did you hear about it? You said you heard about it?

A. I heard about it the next day.

Q. From whom?

A. From the boys.

Q. What do you mean by the "boy-"? Who are they?

A. Why, the son and the son-in-law.

[fol. 362] Q. Your son and son-in-law told you the day following about the damage to the motorboat, did you say?

A. They didn't come back until the next day.

Q. If you did not make that contract, why should they be at all interested in telling you about it?

A. I didn't make any contract. I told them that.

Defendants' Counsel: I object to that.

Q. Mr. Simpson, after learning of the injury to the motorboat, did you not make any effort to ascertain the extent of that damage?

A. I don't know anything about the damage.

Q. But you just said you heard of it the very next day?

A. I heard about it, and I heard of it the next day from the boys.

Q. What date was that, the next day from the boys that you just said?

A. I don't know; the 10th or 21st.

Q. Did you make any effort to ascertain the extent of the damage?

A. No. No, I didn't.

Q. Did you not call up the Consolidated Shipbuilding Corporation?

A. No, I didn't.

Q. During the tow, Mr. Simpson, on October 19th, 1925, did you have any conversations with your son and son-in-law while the boat was being towed down the river? Did they call you up from Fisher's Dock at Jersey to tell you that they docked there?

A. I don't remember.

Q. What is your best recollection as to that?

A. I don't remember; I couldn't tell you.

Q. Would you say that they did not call you up from Fisher's dock to tell you that they had docked there?

A. I wouldn't say anything about it. I don't remember.

[fol. 363] Q. Mr. Simpson, you have made a number of affidavits in this case? Haven't you signed a number of affidavits on motion papers, and you also signed your answer, did you not?

Objected to. Colloquy.

Q. Mr. Simpson, have you ever before this very moment in Court stated in any of your affidavits the fact that you told Mr. Roos about the tides and the driftwood? Have you ever made any allegation?

A. Mr. Roos knows the tides.

By the Court:

Q. Did you ever put that in your affidavit?

Defendants' Counsel: The affidavit would be the best evidence.

By Plaintiff's Counsel:

Q. Did you not put in any affidavit any allegation as to the tides and the drift-wood?

A. About the tides and drift-wood?

Objected to. Argument.

By the Court:

Q. Did you say anything in your affidavit about any conversation with reference to the drift-wood?

A. I don't think so. Not that I know of.

By Plaintiff's Counsel:

Q. This is the first time that you have ever made that claim here in Court, isn't it?

A. The first time.

[fol. 364] Q. And you have had a number of opportunities to assert——

Defendants' Counsel: If your Honor please, I object to opportunities.

Plaintiff's Counsel: This is cross-examination, your Honor. I am testing his credibility.

The Court: Put your question.

Q. I show you the answer that you swore to on May 27th, 1926, comprising six pages, and ask you whether there is any allegation in that concerning drift-wood——

Objected to.

Q. Or the tides?

Objected to. Colloquy.

Q. This is the first time in this case that you have——

Objected to.

Q. Was this the first time that you made any claim as to the presence of drift-wood and tides?

A. Yes.

Plaintiff's Counsel: That is all.

Redirect examination.

By Defendants' Counsel:

Q. Will you tell us about the check, with the permission of the Court? The check was made payable to your order, [fol. 365] and was endorsed by you, as I understand, and the money was turned over to the boys who took the boat down there in their boat, the "White City"?

Objected to. Sustained.

Juryman No. 6: May I ask a question?
The Court: Yes.

By Juryman No. 6:

Q. When you heard that the boat was damaged and you received the check in your name, why didn't you send the check back, because it was not coming to you; it was coming to the boys?
A. That check didn't come for a long while after.

Colloquy.

By Juryman No. 7:

Q. Did they find any objection when you sent the bill?
A. I didn't send any bill.
Q. Well, how did you get the check?
A. I don't know. I didn't send any.
Q. Who sent the bill?

Defendants' Counsel: We will show you our witness who sent the bill. Mr. Rhodes, who did the work, used one of his billheads and sent the bill. That is all, your Honor.

[fol. 366] William A. Rhodes, one of the defendants, called on behalf of the defendants, having been first duly sworn, testified as follows:

By the Court:

Q. Your name and your address?
A. William A. Rhodes, 151st Street and North River, New York City.

Direct examination.

By Defendants' Counsel:

Q. Mr. Rhodes, are you one of the defendants in this action?

A. Yes, sir.

Q. Mr. Alexander Simpson is your father-in-law, is that correct?

A. That is right.

Q. And Herbert Simpson, the other defendant, in your brother-in-law?

A. He is.

Q. Now, you have been in Court while this trial has been going on?

A. Yes, sir.

Q. How did you and Herbert come to bring this "Drifter" boat from the ship yards of the Consolidated Shipbuilding Corporation down to Port Newark?

A. How did we take it down?

Q. How did you come to do it? What first brought it to your attention?

A. Why——

Q. You own the "White City," is that it?

A. Yes.

Plaintiff's Counsel: I object to that.

Q. How did you come to get the job? Don't you understand me?

A. Through Mr. Simpson.

Q. Which Mr. Simpson?

A. Through my father-in-law, Mr. Alexander Simpson.

Q. Had you seen this letter from the Consolidated Shipbuilding Corporation in reference to taking that boat down [fol. 367] before you got the job. Look at it (showing), a letter to Mr. Simpson. Was that the job that this thing was about?

A. Yes.

Q. The suggestion of your father-in-law, Mr. Alexander Simpson, about conveying this "Drifter" down to Port Newark, is that the way you understood it?

A. That is the way I understood it.

Q. Well, won't you please start in and tell the jury how you come to get the job and what you did? Who called it to your attention?

A. Mr. Alexander Simpson, my father-in-law, called this job to my attention through an accident which had happened to his boat.

Q. What boat?

A. The "Lady Hilda the 2nd."

Q. That is the boat referred to in this letter?

A. In the letter. He asked me and my brother-in-law if I—if we would do the job and take the boat down for them. I consented.

Objected to.

Defendants' Counsel: It is simply preliminary.

A. (Continuing:) I consented.

Q. All right; just tell us what you did on the morning of October 19th.

A. I went over to see Mr. Bauer about my boat, the "White City," at Morris Heights, New York. On arrival there, the tow, consisting of the "Drifter"—the motorboat "Drifter" and the cradle which was to hold the "Drifter" was towed in the stream to us by a Consolidated Shipbuilding boat, and their man that took my line from my boat attached it to the "Drifter" at a distance of forty feet behind. They took a line and attached the line [fol. 368] from the "Drifter" to the said cradle at a distance of another forty feet.

By Plaintiff's Counsel:

Q. What do you mean by that?

A. The employes of the Consolidated Shipbuilding Corporation, they placed a man—the Consolidated Shipbuilding Corporation placed one of their employes on board the "Drifter."

By Defendants' Counsel:

Q. Is that that man here?

A. That is the man.

Q. The captain they call Capt. Weston?

A. Yes. We then proceeded down the Harlem River against the tide, reaching Hell Gate about 11:30, and then

around the east side of Mill Rock past Rhinelander Reef into the west channel of the East River, and proceeded down the west channel of the East River to a point directly underneath the 59th Street Bridge: At this point my attention was called by Capt. Weston to shouts—through his shouts that the cradle had broken loose. At this point I had the tide under me—I had the ebb tide in favor of me. The tide runs in two directions, the Harlem River and the East River. I had the tide in my favor. I turned my own boat, the "White City," with the "Drifter," around and waited by until the cradle had drifted down to us. At this time we picked the cradle up and made it fast by a chain which I had given to Capt. Weston, on the "Drifter." We proceeded down the East River to Governor's Island, going through Buttermilk Channel on the easterly side of Governor's Island. We passed out through the southern end of Buttermilk Channel and across the upper Bay.

[fol. 369] Q. Just tell the jury whether that is the east or west side of——

A. We proceeded from the southern end of Buttermilk Channel to Robin's Reef, the entrance to Kill Von Kull.

By the Court:

Q. That is in Staten Island?

A. Across the lower Bay. We proceeded then up the Kill Von Kull to Bergen Point, and at Bergen Point we proceeded into the entrance of Newark Bay. While we were going through and around Bergen Point entering Newark Bay, the steamer "Susholenco" had appeared, and according to my directions, I was directed to put—to have this boat delivered to the "Susholenco," which was supposed to have been in Port Newark at the time. On seeing the "Susholenco" coming through without cargo, which was evidenced by the height of the waterline or position in the water, which anyone can tell. I was at a loss at that time to understand the situation. That time—that happening was about 3:30. I immediately pulled into the nearest point—the nearest dock and made the tow fast, and at that time, in order to find out why the steamer "Susholenco" had left——

By Plaintiff's Counsel:

Q. What time was that?

A. The time that I arrived at the dock?

Q. Yes.
A. Possibly fifteen minutes after I had——
Q. What time of day I mean?
A. A quarter of four.

[fol. 370] By Defendant's Counsel:

Q. Continue.

A. At this point I tied up the tow and made it fast and secure, and went on down to the dock. I had a little difficulty at the time in getting permission to stay there. Finally I got permission to stay there, and I went out to telephone. I telephoned the Consolidated Shipbuilding Corporation, asking them for some information regarding the "Susholenko's" steaming up. At the Consolidated Shipbuilding Corporation I could find no one at that time who was in authority to tell me just what to do. The party that I was connected with at that time seemed to have been a watchman, and there were no one else to tell me just exactly what to do.

By the Court:

Q. Then what did you do?
A. I asked his advice as to what to do with the tow.

The Court: No.

By Plaintiff's Counsel:

Q. Whom did you ask?

The Court: As a matter of fact, he does not know.

Plaintiff's Counsel: I object to what he was told to do. He does not know.

By the Court:

Q. Do not tell us what conversation you had with the watchman.

A. I then returned to the tow to see that our location—what was the conditions of our location in the basin, [fol. 371] whether or not they were safe and what the traffic conditions were in and out of this particular basin or pier head at which I was laying, and whether any of the boats laying there that night were going to tow or were not going to tow.

By Defendant's Counsel:

Q. Did you find conditions such——

Plaintiff's Counsel: I object to that as calling for a conclusion.

Q. What did you find about the conditions?

By the Court:

Q. What did you do then?

A. At that time I went out, I intended on the advice of the watchman at the Consolidated Shipbuilding Corporation——

Objected to.

The Court: No, do not tell us that.

Defendant's Counsel: He has just told us what he did after——

A. (Continuing:) I then endeavored to get in communication with Mr. Simpson.

By Defendant's Counsel:

Q. Which one?

A. Alexander Simpson, to find out whether he knew anything of the situation. I finally got Mr. Simpson—I got him on the wire after I have a little difficulty in getting the connections, and he told me at that particular time that the [fol. 372] orders of transportation had been changed, and the boat had been changed from the "Susholenco" to the "Suboatzo," due to sail the following morning; also that I had instructions to continue on the next morning. These instructions were given by the shipping clerk of the Consolidated Shipbuildng Corporaton. We made the tow fast there and secure, with a stay over night. Capt. Weston asked to be excused. I didn't see any reason why he should stay. As far as I was concerned, I didn't see any reason either why he should stay. It wasn't my business to know any reason. The following morning, seven o'clock, we left—we left Fisher's Dock and proceeded up Newark Bay to the Trans-Marine, which was about a thirty minute trip. We went up in the Trans-Marine and brought the boat

alongside. We detached the "White City" from the "Drifter." We then made fast to the cradle and towed the cradle alongside the "Drifter," and then we moored our own boat—made our own boat fast to the dock a few feet ahead. At this time the crane—the loading crane at the dock came alongside, and we made the slings fast—the employes of the dock made the slings fast on the cradle and lifted the cradle to the deck of the boat. After this had been done, the crane moved over to the "Drifter" and let down her tackle and placed the slings about the "Drifter," which I and my partner, my brother-in-law, Herbert Simpson, helped to do. After we had finished putting the slings about the boat, we stepped ashore before they had raised the boat, and I requested permission from the shipping clerk to go to breakfast.

Q. What shipping clerk? An employe of the Consolidated Shipbuilding Corporation?

A. Yes.

The Court: Mr. Bauer.

[fol. 373] A. (Continuing:) He pointed out a restaurant to me on the premises, about a four or five minute walk away, and so I went over. I hadn't had anything to eat the night before.

By the Court:

Q. All right; you went to breakfast?

A. I went to breakfast, and while I was at breakfast, one of the employes of the dock was sent by Mr. Bauer to notify me of a damage on the starboard side of the boat, aft. I immediately went over and found out just exactly what this damage was. I didn't understand it. My partner also went. We arrived there and he pointed the damage out to me, after moving one of the slings aside so that I could see the position of the damage.

Q. The boat was still in the water?

A. The boat was still in the water, yes, sir. I examined the damage thoroughly, the nature of it, the location of it. I was at a loss entirely——

By Defendant's Counsel:

Q. Tell the jury——

A. I was at a loss entirely to explain the damage.

Q. Tell the jury what injuries you saw there.

A. Certainly, I will tell the jury what I saw. There was a stove; it wasn't a hole; it was a dent, you might say, between two ribs of the boat, at a distance of about twelve inches; these two planks four inches apiece, a total distance of eight inches by twelve, were stove; and at that point there was a drain, a waste of some sort—an exhaust waste over the side of the boat, in—in the shape of a pipe which led out over the side. Now, that had been dented back for a distance of probably three-quarters of an inch, not [fol. 374] enough to allow any leakage of water, not completely through the boat, by any means. The damage appeared to me to have been done through——

Plaintiff's Counsel: I object to that.

The Court (to witness): No, you cannot. You are surmising.

A. (Continuing:) The damage appears to have been done through impact——

By the Court:

Q. No; with something?

A. With something—some object—some floating object. The location of the damage——

Plaintiff's Counsel: I object to conjectures as to the cause of the damage.

Defendants' Counsel: Just its appearance.

The Court: It is just conjecture.

By Defendants' Counsel:

Q. Now, when you brought the boat into Port Newark, they first raised the object called the cradle up on the ocean-going boat to take to Texas?

A. Yes, sir.

Q. Were you there while that was going on?

A. I was.

Q. Did you see Mr. Bauer help to put ropes around the "Drifter" preparatory to lifting that up? Was he there?

A. He was on the stringpiece. Mr. Bauer was on the dock.

Q. Well, tell us what you saw Mr. Bauer do.
[fol. 375] A. I saw him standing around and sort of directing the riggers where to sling the boat, and what to be careful of, and so forth; that is, the—the shape of the boat under water, he explained that to me.

Q. What?

A. He explained that to me under the water and where to put the slings so as not to damage the boat underneath the water.

Q. And he was working on that when you went to breakfast?

A. He was.

Q. Before you went to breakfast, did Mr. Bauer or anybody else state to you that there was any damage on this boat?

A. None whatever.

Q. When you delivered the boat to Port Newark, was there any damage upon it?

A. No, sir.

Plaintiff's Counsel: I object to that.

By the Court:

Q. No; all you can say is that you did not know of any damage.

A. I didn't know of any damage.

By Defendants' Counsel:

Q. Well, you saw the boat?

A. Yes.

By the Court:

Q. Did you examine that spot before you left the boat?

A. No, sir.

By Defendants' Counsel.

Q. Well, which side of the boat was it?

A. On the port side, aft, approximately an inch above the waterline.

Q. Was that side near the pier as they were trying to [fol. 376] raise it?

A. The starboard side laying to the dock at Port Newark.

Q. The starboard side lays next to the pier?

A. At Port Newark.

Q. At Port Newark?

A. Yes, sir.

Q. Now, you said that Mr. Bauer cautioned the men to be careful on the raising of it, and explained the formation of the bottom?

A. He did.

Q. Now, just what danger could there be in raising——

Objected to.

By the Court:

Q. What did he say with reference to the danger?

A. There was the danger in breaking the shoe or getting the slings too far out, and not have the weight properly placed.

By Defendants' Counsel:

Q. And the side of the pier consists of stone or logs, or what?

A. Logs and corrugated logs.

Q. And this crane is an iron arm, and it has chains or ropes coming down, and these in turn are attached to other chains or ropes around the——

A. Around the boat.

Q. Put around the boat?

A. Yes.

Q. And if that is not handled carefully, some damage will be caused?

A. Yes, sir.

Objected to. Colloquy.

Q. He told the men to be careful?

A. Yes, sir.

Q. Was that at the time——

A. After the time.

Q. Was that at the time that these people were working there that he spoke of that?

A. Yes, sir.

[fol. 377] Q. You heard him testify as to how much this boat weighed?

A. I have forgotten. He says that boat——
Q. Weighed approximately eight tons.
A. Eight tons.
Q. Alive or dead?

Plaintiff's Counsel: Alive or dead is an entirely different thing.

Q. At that point you were to breakfast?
A. Yes, sir.

Plaintiff's Counsel: What point was that?

Q. At the point where they were about to raise this boat from the water up into the ocean-going boat, and Mr. Bauer was in charge at the time——

Objected to as leading; sustained; exception.

Q. What was the condition? What was going on when you went for breakfast?
A. The boat was being prepared to raise it.
Q. Did you see this? Look at it (showing).
A. I did.
Q. Did you ever see that paper before?
A. I did.

Objected to. Colloquy.

Q. My question is, did you see that paper before? Now, that is a proper question.
A. I did.
Q. Where did you receive it?
A. I received it at Port Newark.

[fol. 378] Objected to.

Q. Who gave it to you?
A. Mr. Bauer.

Objected to. Sustained.

Q. Now, did Bauer speak—let us have this thing right in the ball's eye. What claim did Bauer make?

Plaintiff's Counsel: Objected to.

Q. What did Bauer say to you when you came back from breakfast? You came back from breakfast and did you see Bauer?

A. Yes, sir.

Q. Now, will you tell the Court and jury all that was said?

A. Mr. Bauer met me on my way back from breakfast and brought me over to the boat and showed me the damage and asked me to explain how the damage was done, where the damage happened. I was at a loss to know where the damage happened; I knew of no damage.

By the Court:

Q. What did you say?

A. I told him I knew nothing of it, absolutely nothing of the damage; it was the first time I had ever seen it. He wanted to know how it came—how the damage happened to be there. At the time I looked at the damage, the sling—one of the slings was made fast, fastened down the side of the boat directly at the point where this outlet pipe had been, and passed over the outlet pipe. I explained to him why it might possibly have been on the lifting of the boat——

Objected to.

[fol. 379] Q. What did you say to him?

A. I asked him if he had raised the boat.

Q. Just say, "I said to him."

A. I had asked him if he had raised the boat. His answer was, "Yes," they had started to raise the boat immediately. I took into consideration that they——

Q. No, what did you say to him?

Plaintiff's Counsel: I move to strike it out.

The Court: Strike it out. What did you say?

By Defendants' Counsel:

Q. What did you say?

A. That lifting it had caused this damage.

Q. What did you say to Bauer about that, the lifting?

A. It might have been damaged in the lifting.

Q. What did you say to him?

A. I told him——

Plaintiff's Counsel: I object to that and move to strike it out.

By the Court:

Q. What did you say?

A. I told him I was at a loss to explain the damage. The one instance that I gave him was—I explained to him that it possibly might have been from the lifting of the boat.

Plaintiff's Counsel: I object to that, and object to conjectures.

Q. I want you to use the word "say"; "I said to him" [fol. 380] and "he said to me;"—the simplest word in the English language.

A. I said to him that I was at a loss to know how the damage happened. I also said that the damage could possibly have happened through the lifting of the boat and by the placing of the slings in the wrong position.

By Defendants' Counsel:

Q. How?

A. Over the outlet pipe, which would have driven the entire thing through.

Plaintiff's Counsel: I move to strike it out.

By the Court:

Q. You said that to him?

A. Yes, I said that to him.

(Noon recess.)

WILLIAM A. RHODES, one of the defendants, recalled:

Direct examination (continued).

By Defendants' Counsel:

Q. Tell the jury and the Court who are the owners of the boat "White City"?

A. Mr. Herbert Simpson and myself.

Q. Mr. Herbert Simpson is the son of Alexander Simpson?

A. He is.

Q. This young man and yourself own the "White City"?

A. Yes, sir.

[fol. 381] Q. You got a bill of sale of that some years ago?

A. We have.

Q. What is that boat usually used for? What kind of a boat is it?

A. It is used for pleasure purposes, and for transporting passengers on excursion trips.

Q. Is this the boat (showing)? Can you see that exhibit stamp on the back?

A. No, sir.

Q. Will you have the stenographer look at it to tell you what exhibit it is?

Defendants' Counsel: Will you please identify that exhibit?

Stenographer: Defendants' Exhibit B.

Q. This Defendants' Exhibit B you are now looking at, is that the "White City"?

A. No, sir.

Q. That is not the "White City"?

A. No, sir.

Q. Well, describe the "White City".

A. The "White City" is a boat similar in style and design to this boat.

Objected to. Colloquy.

Q. You say it is similar to that?

A. Similar in style.

Q. Have you a picture of it with you?

A. No, I haven't.

Q. What is it used for?

A. It is used for transporting passengers and excursion business.

Q. It is not a tugboat?

A. No, sir.

Q. You do not own any tugboat?

A. I don't.

Objected to. Colloquy.

Q. I show you Plaintiff's Exhibit No. 4 and ask you [fol. 382] to look at it (showing)?

A. Yes, sir (looking).

Q. Have you looked at it?

A. I have.

Q. Is that in your handwriting?
A. It is.
Q. What is it?
A. It is a bill rendered for services.
Q. Did you make that bill up?
A. I did.
Q. Did you use a letterhead of your father-in-law?
A. I did.
Q. Is that "White City" the boat that is usually housed at his place?
A. Yes, sir.

Objected to.

Q. Did you receive that money, the $75, from the Consolidated Shipbuilding Corporation?
A. I did, yes, sir.
Q. Did your partner go to the Consolidated Shipbuilding Corporation to——
A. He did.

Objected to.

Q. You and your partner received that $75?
A. We did.

By the Court:

Q. Whom did you receive it from?

By Defendants' Counsel:

Q. The check was made payable—have you got the check?
A. I don't get it right.

Plaintiff's Counsel: Let us get everything right, Mr. Sullivan.

[fol. 383] Q. That was paid by the Consolidated Shipbuilding Corporation in that check that you have in your hand, which is an exhibit in evidence here now?
A. Yes, sir.
Q. And that was made payable to your father-in-law?
A. It was, sir.
Q. And by him endorsed and you and your partner got the money, is that it?
A. Yes, sir.

Q. Originally?

Motion to strike out. Colloquy.

Q. It was endorsed and you got the money—you and your partner?

A. Yes.

Q. Mr. Roos, of the Shipbuilding Company, swore in his affidavit before that he employed him. I asked him if he swore to that affidavit, and he said, "Yes", and that exhibit is before the Court and one of the papers. He said he employed this witness. (to Court)——

The Court: Gentlemen, I want to try another case this month.

Q. And the money was turned over to you and your partner on this check?

A. Yes, sir.

Q. And this bill was in your handwriting, and you used one of the billheads of your father-in-law at the boat house?

A. Yes, sir.

Q. When the motorboat called the "Drifter" was received at Morris Heights, the shipyards of the Consolidated Shipbuilding Corporation, were there any protections on the sides in case of collision?

A. No, sir.

[fol. 384] Q. Did the Consolidated Shipbuilding Corporation put any protection down the sides of the "Drifter"——

A. None whatever.

Q. At the time it was delivered to you?

A. None whatever.

Objected to; overruled; exception.

Q. Did you find in the "Drifter" any material, or arrangement that was not put on the boat by the Consolidated Shipbuilding Corporation?

Objected to; sustained.

Q. Is that the way boats are being conveyed to have some protection to avoid any collision?

A. It is.

Objected to; sustained.

Q. After Mr. Bauer showed you the boat "Drifter" after you came back from breakfast on the morning of the 20th

of October at Port Newark, did you look at what he claimed to be the damage?

A. I examined it thoroughly.

Objected to.

Q. Did you you look at it?

A. I did. I examined it thoroughly.

Q. Was that the only damage that he complained of?

A. That was all.

Q. You have already described it to the Court. How long have you been in the boat business?

A. Fifteen years.

Q. Are you familiar with the cost of boats?

A. I am.

[fol. 385] Q. Their structure and their repair?

A. I am.

Q. And over that period of time?

A. Yes.

Q. What do you say to the jury was the reasonable cost for the repairs of the damage that Mr. Bauer showed you?

Objected to.

Q. Do you know what the market cost of vessel repairs is in the City of New York?

A. I do.

Q. You have had boats repaired?

A. Yes, sir.

Q. Do you know about their structure?

A. Yes, sir.

Q. And the market cost of such repairs?

A. I do.

Q. And you have been familiar with that, you say, for upwards of fifteen years?

A. Yes, sir.

Q. Now, what do you say is the fair market value of the repairs for the damage that Mr. Bauer pointed out to you?

A. Not over $55.

Objected to on ground of not being properly qualified. Court allows plaintiff's counsel to examine him on that.

By Plaintiff's Counsel:

Q. What shipbuilding firms have you ever been employed by?

A. I have been employed by my father-in-law.

Q. Does your father-in-law build ships and boats?

A. Yes.

Q. What kinds of boats?

A. Similar to the one that I towed—pleasure boats, small boats.

Q. Would you consider a forty-five foot $25,000 pleasure yacht a small boat?

[fol. 386] Objected to.

Q. Have you ever yourself bid on any jobs for the construction of a boat?

A. Have I bid on this work?

Q. Yes.

A. No, I haven't.

Q. Have you ever fixed the prices on any parts or repairs to boats yourself?

A. Fixed the prices?

Q Yes, on any jobs?

A. I have.

Q. Will you tell the circumstances under which you did that? When was that?

A. On repair jobs.

Q. When?

A. Motor repair jobs, while I was working for my father-in-law.

Q. When was that?

A. In 1917.

Q. How old are you?

A. Twenty-seven.

Q. You have been in this business for fifteen years?

A. I have.

Q. And some of that time, of course, you compute from the time that you were twelve years old, is that right?

A. From the time I was twelve years old?

Q. Yes.

A. Somewhere in that neighborhood.

Q. So you consider yourself expert in this business, we will say, from the time that you were twelve years old until the time that you were twenty?

A. I do, and at the time of the accident, yes.

Plaintiff's Counsel: I do not feel that this witness has been properly qualified, your Honor.

The Court: I will take it for what it is worth.

[fol. 387] By Defendants' Counsel:

Q. What do you say is the fair and reasonable market cost of the repair, to repair the damage that Mr. Bauer showed you, that you have already specified?

A. Not over $50.

Q. Have you been about the waters on and off during that period of time that you speak of?

A. I have.

Q. You are familiar with the Harlem River and New York Bay and Hudson River, and waters about New York City?

A. Yes; I have a license for that.

Q. Have you seen drift-wood?

A. Plenty of it.

Q. Did you ever see the water when there was no drift-wood of some character on it?

A. Not that I can remember.

Q. Will you tell the nature and extent of this drift-wood that you have seen during these periods?

A. Yes, sir, various sizes and sorts.

Objected to; sustained.

Q. You have seen great logs?

A. Yes, I have.

Objected to.

Q. There is never a time when the water is not full of it?

A. Never.

Q. Tell the Court in general what this drift-wood consists of.

A. It consists of almost anything from a derelict hull to a piece of an egg crate, and piles and timber, 12 by 12 timbers, piling, and partial wrecks—submerged wrecks.

[fol. 388] By Plaintiff's Counsel:

Q. When did you see a wreck on the water?

Defendants' Counsel: Just a minute.

By Defendants' Counsel:

Q. The heavier the log, the more submerged it is, floating towards the top?

A. When it is water-logged, twenty feet of it may be submerged and one foot may be on the water surface.

Q. And going against the tide, with the drift-wood coming with it, would that increase the danger of drift-wood?

A. Yes.

Plaintiff's Counsel: I object to that.

Q. How? Tell the Court why.

The Court: I will take it.

Plaintiff's Counsel: I still note an objection to that question.

The Court: Objection overruled.

Plaintiff's Counsel: Exception.

Q. Could the damage that Mr. Bauer showed you have occurred from contact with drift-wood?

Plaintiff's Counsel: I object to that.

The Court: I do not get that.

Q. The damage that Mr. Bauer showed you on the "Drifter", would that be occasioned by coming in contact with drift-wood?

[fol. 389] By the Court:

Q. Could it be?

A. It could.

Defendants' Counsel: That is all.

Cross-examination.

By Plaintiff's Counsel:

Q. Where do you live, Mr. Rhodes?

A. 151st Street and North River, on the waterfront.

Q. You live in the same house with your father-in-law?

A. Not in the same house; next door.

Q. You live *never* door to him?

A. Yes, sir.

Q. All this time that you say that you have been employed in the shipbuilding business or in the employ of your father-in-law, isn't that right?

A. That is right.

Q. You never had any experience in boats outside of the experience that you got from your father-in-law?

A. At odd times I have worked for other concerns in the shipping line.

Q. Will you name the other concerns that you worked for?

A. The Standard Oil Company of New York and New Jersey.

Q. What yards did you work there in?

A. Empire Yard, Long Island City.

Q. When was that, Mr. Rhodes?

A. That was in—about a couple of years ago—three years ago.

Q. And how long did you work there at that time?

A. I worked there for about nine months.

Q. What did you do?

A. I was employed on one of the boats.

Q. Doing what?

A. In the capacity of mate.

The Court: Speak up.

Q. As mate?

A. Right.

[fol. 390] Q. And during that time yon never had any occasion to fix prices on any repair jobs, did you?

A. Only to discuss them.

Q. Only to discuss them?

A. Yes, sir.

Q. What was the other job that you held prior to three years ago? You mentioned something about a job in 1917.

A. I had boats of my own at that time, I worked in the harbor.

Q. What other job did you have in 1917 that you mentioned on your direct examination?

A. The other job?

Q. Yes.

A. In reference to a boat that was held in my father-in-law's yard for repair work at that time.

Q. But that was with your father-in-law?

A. It was.

Q. Well, name any other steamship company or shipbuilding concern that you have been employed by.

A. That is all.

Q. Just your father-in-law in one instance, and when you worked for the Standard Oil Company in the capacity of mate?

A. That is right.

Q. Now, Mr. Rhodes, what did you do at your father-in-law's place?

A. Employed in just such work as handling boats, towing, and on small jobs, towing floats, rafts and things of that sort, and taking pleasure parties.

Q. That is all for that question. Have you got a towboat license?

A. A towboat license?

Q. Yes, a towboat captain's license?

A. A captain's license, yes.

Q. And yet you undertook to tow this boat "Drifter" without a license?

[fol. 391] A. I have a license covering my own boat. There is no special towboat license.

Q. Did you have any conversations with Mr. Roos as to this particular towage job?

A. I didn't.

Q. It was your father-in-law told you take the boat out, to go and tow it down to Port Newark?

A. He told me of the job and asked me——

Q. You did not have any independent contract with the Consolidated Shipbuilding Corporation, did you?

A. Independent contract?

Q. Yes, or any contract at all?

A. Not that I recall.

Q. You had no conversations with him in respect to this towage job?

A. Not with Mr. Roos, no.

Q. Or with anybody else?

A. No, sir.

Q. You sent Fred Weston home, didn't you, when you got to Fisher's Dock?

A. I didn't send him home, no.

Q. You told him to go home?

A. I told him he could go home.

Q. Then you sent him home, didn't you?
A. I did not.
Q. You just told him he could go?
A. If he wished.
Q. Did you make this statement on October 26th, 1925? Is that your signature down there (showing)?

Defendants' Counsel: That is one of the exhibits, isn't it?
Plaintiff's Counsel: No, sir.

A. I signed that statement, yes.

[fol. 392] Plaintiff's Counsel: All right; I would like to read something from it.

Colloquy.

Q. (Reading:) "We made the lines fast on the launch ——"

Plaintiff's Counsel: I object to that.
The Court: Did he make this statement?

Q. Did you make this statement: "We made the lines fast on the launch and the towboat thoroughly supervised a proper mooring for the night. In the morning at seven o'clock we proceeded to the steamer and found the steamship company ready to take this boat aboard. On investigation by the representative of the Consolidated Shipbuilding Corporation, they called my attention to damage on the starboard side of the boat, the hull being punched in." Did you not make that statement? Did you or did you not?
A. I did.
Q. In this statement of October 26th, 1925, you never made any statement that the boat had been pulled up by slings, or they had started to pull the boat up by slings, did you?
A. I didn't make the statement myself; I didn't draw up the statement myself.
Q. You signed the statement, didn't you?
A. I signed it, yes.

By Defendants' Counsel:

Q. Who drew up this statement?

Plaintiff's Counsel: I object. This is cross-examination.
[fol. 393] The Court: This is cross-examination.

By Plaintiff's Counsel:

Q. You did not include any such assertion as that?
A. No.
Q. You signed the statement as being true, didn't you?
A. Yes.
Q. At that time this purported to be a full statement of the facts, didn't it?
A. No, sir.

Defendants' Counsel: I object to what it purports.

Q. At this time, six days after the accident, you did not think it of sufficient importance to add this fact concerning which you have testified today, did you?

Defendants' Counsel: If the Court please, he stated that he did not draw that up.
The Witness: I didn't draw that up; I signed it.

Colloquy.

Defendants' Counsel: I offer it in evidence.
The Court: No, this is cross-examination. He has got the witness: Now, let him go ahead.

Q. You did not think it of sufficient importance at the time that you made this statement, six days after the accident, to include any assertion as to the boat being lifted up into the "Drifter"?
A. I didn't make this statement.
[fol. 394] Q. Then do you want to change this statement in any way now?
A. No, sir, not that statement.
Q. And yet you want to have it appear that the testimony that you testified to today is true?

Objected to; sustained; exception.

Q. Did you prepare this statement?
A. No, sir.
Q. Will you state the circumstances under which it was prepared?
A. It was prepared by Mr. Roos in his office.
Q. In your presence?
A. In my presence, yes.
Q. And you read it over before you signed it?
A. I did.

Q. You did?

A. Yes, sir.

Q. And everything that you state here is true?

A. It is.

Q. At what time did you arrive at Morris Heights on the morning of October 19th, 1925?

A. Possibly 8:30, I believe it was.

Q. What was your understanding as to the time of arrival after your conversation with your father-in-law?

A. To be there around six o'clock A. M.

Q. About six o'clock A. M., and yet you came at half past eight?

A. I was delayed.

Q. Answer my question.

Plaintiff's Counsel: I move to strike out the answer.

Q. You were told to be there at six o'clock, and yet you came at half-past eight, and you knew that if you delayed your arrival, the tide would be against you, didn't you?

A. No.

[fol. 395] Q. Isn't it a fact that as the day progressed the tide came in against you?

A. No.

Q. Do you mean to repudiate or refute the testimony of your father-in-law in this record?

Objected to; sustained.

Q. You understand, don't you, that the tides have a regular time for ebb and flow?

A. They have.

Q. And that at half-past eight there would be a certain progression against you of the tides? Do you know that?

A. Yes.

Q. And yet you want this jury to believe that it would make no difference if you started at half-past eight rather than at six?

A. Not on a five-hour trip.

Q. I would like to read again—did you make this statement on October 26th, 1925: (Reading:) "We made the lines fast * * * ready to take this boat aboard"? Did you make that statement?

A. I did.

Q. And then did you make this statement: (Reading:)

"On investigation * * * the hull being punched in," and you made this statement——

Objected to.

Q. You made this statement immediately following the one before, didn't you? Did you or did you not? You made the second statement immediately following the first statement that I read?

Objected to.

[fol. 396] Q. Did you or did you not?

A. I don't recall the order in which they were made.

Q. I ask you whether you did, the marked paragraph immediately following the one before it (showing)? Did you or did you not?

A. I don't recall just the order in which the statements were made.

Q. But you heard the order, didn't you, and that paragraph appears immediately following the other one; doesn't it?

A. It does there, yes.

Q. On October 26th, 1925, you did not think it of sufficient importance to add the statement, and a lot of intervening things came in before you started that the damage was discussed?

A. It wasn't deemed necessary by Mr. Roos. What appears there was all——

Objected to; overruled.

Defendants' Counsel: I ask that it be offered in evidence.

The Court: It does not have to be offered in evidence at the present time. You can examine him on it after he gets through.

Q. You saw the cradle being hoisted up on the dock of the Trans-Marine pier, did you?

A. I saw it being hoisted aboard the ship, yes, sir.

Q. How long did you stay at the Trans-Marine pier before you went to your breakfast?

A. Possibly three-quarters of an hour.

Q. You did?

A. I did.

Q. Did you see the ropes actually being put around the "Drifter"?

A. I helped to put them around.

Q. You helped to put them on?

A. Yes, sir.

[fol. 397] Q. Who else was there?

A. My brother-in-law was there, and Mr. Bauer of the Consolidated Shipbuilding Corporation.

Q. And did he help put the lines around the "Drifter," too?

A. He was on the stringpiece, directing.

Q. How far away from the lines? How far away was he from the edge of the pier?

A. From the edge of the pier?

Q. Yes.

A. He was at the edge of the pier.

Q. How long did you stay at breakfast before they told you that the damage had been occasioned to the motor-boat?

A. Twenty minutes.

Q. About twenty minutes? Is that your best recollection as to that time?

A. That is my best recollection, yes; before I finished my breakfast.

Q. And then you came back and examined the boat, did you?

A. I did.

Q. How long a time did you spend in such examination?

A. Probably seven or eight minutes.

Q. About seven or eight minutes?

A. Yes.

Q. In your fifteen years' experience with your father-in-law and nine months' experience with the Standard Oil Company as a mate, have you ever had occasion to survey damage to boats and render a report to the owners of them?

A. I have.

Q. You have?

A. Yes.

Q. Will you please state when you did that?

A. In collisions with other boats.

Q. When did you do that?

A. When?

Q. Yes.

A. In the course of the summer of 1921.

Q. In the course of the summer of 1921?
A. Yes, sir.
Q. And at that time you were working for the Standard Oil Company as a mate?
A. I was.
[fol. 398] Q. And your duties were so multitudinous that you also were engaged by someone as surveyor to survey damage in the collision?
A. I operated my own boat on Sundays.

Objected to.

Q. For whom did you make that survey?
A. For whom?
Q. Yes.
A. I made that survey job for a friend of mine.
Q. What is his name?
A. The name? Dietrich.
Q. Mr. Dietrich?
A. Yes, sir.
Q. And the name of the boat that you surveyed?
A. The name of the boat was the "Chateau Thiery."
Q. What kind of a boat was it?
A. A small cruiser.
Q. Is she registered at the Custom House?
A. I don't remember.
Q. How much did you get for the job?

Objected to; overruled.

Q. How much did you get for the boat?
A. I didn't receive anything.
Q. You did it gratuitously for a friend of yours?
A. Yes.
Q. This was in the summer of 1921?
A. Yes, sir.
Q. How long did it take you to survey that boat?
A. I should judge about a half hour.
Q. A half hour?
A. Yes, sir.
Q. And yet, when you examined the "Drifter", you thought that about a seven minutes' look was enough, didn't you?
A. Enough for that damage, yes.
[fol. 399] Q. What damage did you find in 1921 that took you a half an hour to survey?

A. The damage of the side of the boat, stove in.
Q. I did not hear that.
A. The damage of the boat being stove in by another.
Q. What is the name of that boat that stove in the side of this boat, the "Chateau Thiery"?
A. I don't recall the boat; I don't know the boat. The boat had been stove during the night.
Q. For whom did you render this report, Mr. Rhodes?

Objected to.

A. For a friend of mine.
Q. What was the purpose of the rendition of that report, Mr. Rhodes?
A. The purpose?
Q. Yes.
A. To establish the value of the damage.
Q. And to whom did you submit that report?
A. I submitted that report to Mr. Dietrich himself.
Q. Is there any other boat that you surveyed in 1921?
A. For a damage, that is the only one.

Plaintiff's counsel move to strike out testimony on the ground that the witness is not qualified. Overruled; exception.

Defendants' counsel offers in evidence statement read from by plaintiff's counsel. Same received in evidence. Defendants' counsel reads same to jury.

[fol. 400] LIBELLANT'S EXHIBIT 2 FOR IDENTIFICATION, OFFERED AT HEARING OCT. 16TH, 1929

Speedway

Cable: "Excellent New York." Telephone: **Tremont 2800**

Steam and Sail Yachts. Speedway. **Gasoline Engines.** Steel and Wooden Vessels, Marine Engines, and Boilers

Consolidated Shipbuilding Corporation, **Morris Heights,** New York City, Formerly Gas Engine & Power Company and Charles L. Seabury & Company, Consol.

Yacht Drifter & Owner

Sold to T. C. Frost Oct. 28, 1925

Frost National Bank, San Antonio, Texas

Terms: Cash. No claims for deduction will be allowed unless made within 10 days from receipt of goods. No responsibility for loss or damage to goods after obtaining Shipping Receipts or Bill of Lading from Railroad, Steamboat, or Transportation Company Signed in Good Order.

9619N

To repairing damage to Yacht "Drifter" sustained while in transit from Morris Heights to S. S. at Port Newark, N. J. Oct. 19th, 1925.

Repairing hole in Starboard Side.

Repairing Stem & Furnishing and Installing New Flag Pole Socket, Including Expenses of Extended Trip; Refinishing Paint & Varnishing.

49	Hrs. Painters	@ $1.50	$73.50	
4	Hrs. Painters Foreman	@ 2.00	8.00	
2	Hrs. Coppersmith	@ 2.00	3.50	
1	Hr. Electrician	@ 2.00	2.00	
94	Hrs. Ship Carpenters	@ 1.50	141.00	
7	Hrs. Ship Carpenter Foreman	@ 2.00	14.00	
32	Hrs. Laborers	@ 1.00	32.00	
	Shipping Clerk		20.00	
5	Hrs. Pipe Fitter	@ 1.50	7.50	
	Paints		8.42	
	Ship Carpenters Material		99.64	
1½	Hrs. Power Saws	@ 1.50	2.25	
	Tug Boat Charges to & from Steamer		150.00	
	Survey Fee		26.00	
	Expenses		8.00	
				$595.81

3410N

Hauling out 10/21 & Launching 10/29		35.00	
6 Lay Days	@ 30.00	180.00	
			215.00
			$810.81

Received payment.
Consolidated Shipbuilding Corp., per W. J. Bolin, Cashier.

Dec. 26, 1925.

[fol. 401] IN UNITED STATES DISTRICT COURT

[Title omitted]

LIBELLANT'S ORDER CONFIRMING REPORT OF COMMISSIONER—March 22, 1930

Upon the annexed affidavit of Henry W. Steingarten sworn to March 21, 1930, the order of the special commissioner dated February 19, 1930 and filed with the clerk of this Court on February 21st, 1930, and upon the notice of filing of the report dated March 10, 1930, and it appearing to the satisfaction of the Court that more than five days have elapsed after service of notice of filing of the report upon the proctor for the claimant and that no exceptions to said report have been filed, it is

Ordered, that the report of Special Commissioner Galey as to libellant's damages dated February 19, 1930 be and the same hereby is in all respects confirmed, and it is

Further Ordered that the libellant recover of the S/S "White City," her claimants and stipulators for value, the sum of $782.81 together with interest thereon from the 26th day of December, 1925, and it is

[fol. 402] Further ordered that a final decree to the foregoing effect may be entered herein.

Dated New York, March 22, 1930.

W. Bondy, D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

LIBELLANT'S AFFIDAVIT OF NOTICE OF FILING REPORT OF COMMISSIONER AND SERVICE OF SAME ON PROCTOR FOR CLAIMANTS

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Henry W. Steingarten, being duly sworn, deposes and says that he is an attorney associated with proctor for the libellant herein, and is familiar with the proceedings previously had herein.

On September 23, 1929, an interlocutory decree was signed by Judge Woolsey of this court finding the claimant herein liable for the injuries and damages sustained by the libellant as set forth in the libel herein. The court [fol. 403] appointed J. L. Galey, Esq., special commissioner to ascertain and compute the amount of libellant's damages. Several hearings were held and on the 19th day of February, 1930, the special commissioner handed down his report which was filed on the following day. By said report libellant's damages were computed to be $782.81. The commissioner further found that interest at the rate of 6% should be added to the foregoing from December 26, 1925.

On March 10, 1930, notice of filing of the report was served upon proctor for the claimant and admission of service received. More than five days have elapsed no exceptions to said report have been filed. Under Admiralty Rule 27 of this Court the libellant is, therefore, entitled to an ex parte order confirming the report. The rule reads as follows:

"Exceptions to the reports of commissioners, assessors, or adjusters, shall be filed within five days after service of notice of filing of the report, in default of which the report may be confirmed at the instance of any party by order entered without notice, but upon proof of service of notice of filing the report and default in filing exceptions."

Wherefore it is respectfully submitted that this Court grant an order confirming the report of the special com-

missioner herein and directing the entering of the final decree.

No previous application for this order has been made.

Henry W. Steingarten.

Sworn to before me this 21st day of March, 1930.

[fol. 404] IN UNITED STATES DISTRICT COURT

[Title omitted]

LIBELLANT'S NOTICE OF FILING REPORT OF COMMISSIONER

SIR: Please take notice that the report of the Special Commissioner herein was filed on February 20, 1930, in the office of the Clerk of this Court.

Dated New York, March 10, 1930.

Yours, etc., Neil P. Cullom, Proctor for Libellant. Office and Post Office address: No. 165 Broadway, Borough of Manhattan, City of New York.

To Florence J. Sullivan, Esq., Proctor for Claimant, 505 Fifth Avenue, New York, N. Y.

[fol. 405] LIBELLANT'S EXHIBIT 5

Specifications. Libellant's Exhibit 5 consists of specifications of the SS. "Drifter" and it is stipulated that these specifications may be handed up to the Court upon the argument.

LIBELLANT'S EXHIBIT 6

This exhibit is a blue-print of the SS. "Drifter" and may be offered up to the Court upon the argument.

LIBELLANT'S EXHIBIT 7, OFFERED AT HEARING OCT. 16TH, 1929

This exhibit is an order from T. C. Frost received by the Consolidated Shipbuilding Corporation for repairs to be done upon the "Drifter".

LIBELLANT'S EXHIBITS 1A TO 1M

There are 13 of these time cards, all similar, showing on their face the performance of 94 hours of carpentry work on the SS. "Drifter" and 7 hours of work by the ship's carpenter foreman.

LIBELLANT'S EXHIBITS 2A TO 2K

These cars showed on their face carpenter material used in repairing the SS. "Drifter".

[fol. 406] LIBELLANT'S EXHIBIT 3

These consist of 31 time cards of men who did repair work on the SS. "Drifter".

LIBELLANT'S EXHIBIT 1 OF DECEMBER 12TH, 1929

This exhibit was a notice dated December 5th, 1929, and served upon the attorney for the claimants, notifying said attorney for claimants that a hearing would take place on December 12, 1929, and was signed by the Commissioner.

LIBELLANT'S EXHIBIT 2 OF DECEMBER 12TH, 1929.

This is a letter dated December 11th, 1929, addressed to the attorney for the claimants by the attorney for the libellant and referred to the hearing of December 12th, 1929, and stated libellant would have two witnesses present then to give further testimony and stated that libellant expected claimants to be ready.

LIBELLANT'S EXHIBITS 3A TO 3K OF DECEMBER 12TH, 1929

These exhibits are time cards of painters indicating 49 hours of painting and 4 hours of painter's foreman who

worked on the SS. "Drifter" and that material amounting to the sum of $8.42 was furnished on said vessel.

LIBELLANT'S EXHIBIT 4 OF DECEMBER 12TH, 1929

This is the cost sheet or ledger and is identical with Libellant's Exhibit 2 of Oct. 16th, 1929, printed at page 56.

[fol. 407] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

Upon the foregoing petition, it is

Ordered that the app*arel* herein prayed for by the claimant, the vessel "White City", her engines, tackle, apparel, etc., and the same is hereby allowed.

Dated New York City, May 15th, 1930.

John M. Woolsey, U. S. D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE EXHIBITS

It is hereby stipulated and agreed by and between the attorneys for the parties above named, that the following exhibits introduced in the above action, need not be printed in the record on appeal, but that they and copies thereof, as well as the originals of the exhibits printed in the record, may be handed up to the Court by either party and referred [fol. 408] to upon the argument of the appeal herein as if printed in the record:

* * * * * * *

Dated New York, October —, 1930.

—— ——, Attorney for Claimant-Appellant. ——

——, Attorney for Libellant-Appellee.

[fol. 409] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated New York, November —, 1930.

—— ——, Attorney for Claimant-Appellant. ——, Attorney for Libellant-Appellee.

[fol. 410] Clerk's certificate omitted in printing.

[fol. 411] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1930

No. 319

Argued March 10, 1931 Decided April 6, 1931

WILLIAM STEVENS, Appellee,

v.

THE VESSEL WHITE CITY, etc., Appellant

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, L. Hand, and Chase, Circuit Judges.

Appeal by the claimants from a decree in the admiralty of the District Court for the Southern District of New York, holding liable a towing vessel for injuries caused to the tow.

Florence J. Sullivan, of New York City, for appellant.
James E. Freehill, of New York City, for appellee.

OPINION

L. HAND, Circuit Judge:

The libellant is the assignee of one Frost, who is the owner of a motor yacht, "The Drifter," built for him by the Consolidated Shipbuilding Company, which had promised to deliver her at Port Newark, New Jersey. The

builder's yard was at Morris Heights, New York, and the yacht had to be towed down the Harlem and East Rivers through the Bay, the Kills, and into Newark Bay. For this purpose it made a contract with one Simpson to tow her and her cradle alongside a steamer at Port Newark. Simpson, finding it impossible to tow with his own vessel, substituted the claimants' vessel here in suit, the "White City," which undertook the work. She took the yacht and cradle upon a hawser and started out, there being no one on the tow except a servant of the builder, whose duties were no different from those of the ordinary bargee, and whom we shall consider to have been such. Due to delays in starting and en route, the "White City" did not reach Port Newark in time to deliver the yacht that day, and tied up for the night at a place called Fisher's Dock in Bayonne. The bargee, not wishing to stay aboard, announced that he would leave, to which the master of the "White City" did not object, and he left. The next morning the steamer again got under way and delivered the yacht and cradle to the proper consignee before breakfast.

The libellant proved that the yacht had been delivered in good condition to the "White City," and, upon evidence which satisfied the judge, that when delivered at Port Newark a hole had been stove in her side near the water line, for the cost of repairing which he sued. We see no reason to question the conclusion that the hole was made during the trip, and we dispose of the case upon that assumption. The claimants did not prove when or how the accident happened, or what care they took while towing, or indeed anything except the course they took, that they put fenders about the yacht while she lay at Fisher's Dock, and that in the morning she was in the same condition as when they took her. They suggested that a piece of driftwood, of which there was much in the Bay at that season, might have stove in the yacht's side, but this was merely an assumption. If a presumption of negligence arose from the mere fact of the delivery of the yacht in damaged condition, it had not been met. It extended to explaining how the injury occurred, or else that, however it did, it was not caused by their neglect. The testimony was too scanty to meet this test. The judge held that such a presumption existed from the contract, and that as it had not been re-

[fol. 412] butted, the libellant should recover. The claimants appealed.

There is no doubt that a towage contract, simpliciter, does not put the tow in bail to the tug (The Webb, 14 Wall. 406, 20 L. Ed. 774; Eastern Transportation Line v. Hope, 95 U. S. 297, 24 L. Ed. 477), but when the tow has no one in charge it has repeatedly been said, though generally obiter, that a bailment results [The D. Newcomb (D. C.) 16 F. 274; Bust v. Cornell Steam-Boat Co. (C. C.) 24 F. 188; The Seven Sons (D. C.) 29 F. 543; McWilliams Bros. v. Director General, 271 F. 931 (C. C. A. 2); The James McCue (D. C.) 37 F.(2d) 934; Delaware Dredging Co. v. Graham (D. C.) 43 F.(2d) 852]. Nor does the presence of a bargee change the relation. The Merrimac, Fed. Cas. No. 9478; The Princeton, Fed. Cas. No. 11433a, affirmed Fed. Cas. No. 11434; The Genessee, 138 F. 549 (C. C. A. 2); Doherty v. Pa. R. R. Co., 269 F. 959 (C. C. A. 2).

In the case of charters which are demises, we have often held that redelivery in damaged condition raises a presumption of negligence which the demisee must explain. Terry & Tench Co. v. Merritt & Chapman (C. C. A.) 168 F. 533; White v. Upper Hudson Stone Co. (C. C. A.) 248 F. 893; Schoonmaker, Conners Co. v. Lambert Transp. Co. (C. C. A.) 268 F. 102; Bushey v. Hedger (C. C. A.) 40 F.(2d) 417; Cummings v. Pa. R. R. Co. (C. C. A.) 45 F.(2d) 152. Swenson v. Snare & Triest Co., 160 F. 459 (C. C. A. 2), though at times cited for the same doctrine, is scarcely an authority, because the nature of the injury was such as to justify an inference, independent of presumption. We are committed in such cases to the doctrine which the District Judge applied to the towage of a barge manned only by a bargee. In principle we cannot distinguish between that and the situation at bar; and if free to choose we should follow the decision below. The reason for imposing a presumption appears to be here quite as strong as in demises; that is, the greater opportunity of the bailee to explain the injury, due to the immediacy of his access to the barge and the bailor's absence. Though a distinction might have been drawn when a bargee is present, none ever has been, and the only ground we can imagine is that in a demise the period of custody is usually longer, not a satisfactory difference.

Our own decisions seem to us, however, to have too strongly established an exception to justify a departure now. Whether this has arisen from confusing an ordinary towage contract, where the owner of the tow remains in possession, with a contract like this where the tow is unmanned or manned only by a bargee, we cannot tell. Probably the doctrine generally applicable was carried over to this situation without observing the difference; so far as it appears, the anomaly has not hitherto been observed. The first case in this court that we have found is The Genessee, 138 F. 549, 550, where the tug was held because of "an accident such as in the ordinary course of things does not happen when a bailee uses due care"; but this is inconclusive as to the absence of a presumption arising from injury alone. The decision depended upon an inference from the evidence, as was also true in The Wyomissing, 228 F. 186; Kiernan v. Lake Champlain Transp. Co., 273 F. 499; The Primrose, 42 F.(2d) 827; and The Fred'k Lenning, 45 F.(2d) 691, all decided by this court.

In The Winnie, 149 F. 725, we spoke of the burden of proof alone, which is indisputably upon the bailor, and which has nothing to do with a presumption, though the two are often confused. The tug had made proof, and there was no need for discussing presumption; nor did we do so. The next case was The R. B. Little (C. C. A.) 215 F. 87, where it was doubtful whether the injury had happened during the towing. There was no proof as to what caused it, but we dismissed the libel, using language equivalent to saying that there is no presumption. If proof of any kind does away with, "rebuts" the presumption, this case is not an authority. That however is not the limit of its office, if it exists at all. While it ceases to play any part in the result as soon as the claimant has discharged his duty of "going forward," yet if he cannot explain the injury, he must at least put in some proof to negative the existence of negligence in its occurrence. Once he has done that, the libellant must satisfy the judge of the fault. So understood, the R. B. Little, supra, seems to be a holding against such a presumption; the tug had not satisfied it, if it existed.

In The Clarence L. Blakeslee (C. C. A.) 243 F. 365, 366, the facts were all in evidence and showed just how the barge had been damaged. Strictly therefore it was neces-

sary to hold no more than that the libellant had failed to carry the burden. Nevertheless, we went further and said [fol. 413] that negligence is "not presumed merely because the injury is not otherwise accounted for," though The Winnie, which we cited, was scarcely an authority for that statement. In Aldrich v. Pa. R. R. Co. (C. C. A.) 255 F. 330, the barge had been stove in during the night, and nobody could explain how it had happened. Had she been on charter the bailee would have been liable; his immunity could rest only upon the absence of any presumption in a towage contract. In The Greenwich (C. C. A.) 270 F. 42, the whole situation was brought out, and our comment that the injury raised no presumption was obiter; nevertheless, it shows the doctrine which we supposed applicable. The same is true of The W. H. Baldwin (C. C. A.) 271 F. 411. The libel in Hildebrandt v. Flower Lighterage Co. (D. C.) 277 F. 436, affirmed without opinion in (C. C. A.) 277 F. 438, was against both tug and charterer, and the case was disposed of on a different theory as to each. Against the charterer a presumption was assumed, but not so against the tug, whose negligence the libellant was called upon to prove. In Brigham v. Cornell Steamboat Co., 18 F.(2d) 92, we concluded that the breaking adrift was due to the fault of the bargees, but we said that the tow must prove negligence, by which we meant that it must so prove it in the first instance. We read The Ellen McGovern (D. C.) 27 F. 868, as imposing liability because of an inference of fact, though it is true that Brown, J., spoke of the burden of proof thereby thrust upon the tug, a not altogether clear statement.

The Seven Sons (D. C.) 29 F. 543, is a holding to the contrary, but not in this circuit. The Sea Lion (D. C.) 12 F.(2d) 124, Southgate v. Eastern Transp. Co., 21 F.(2d) 47 (C. C. A. 4), and The Ashwaubemie, 3 F.(2d) 782 (C. C. A. 4), contain at least dicta in accord with our view. We understand Delaware Dredging Co. v. Graham (D. C.) 43 F.(2d) 852, to hold that there is a presumption which does not extend, however, to explaining the cause of the injury. To neither of these propositions can we assent; first, we think that there is no presumption; second, if there were, that the bailee must explain the cause of the injury, or, if he cannot, that it was not due to his neglect. While we cannot find that there has been an authoritative

ruling to the contrary elsewhere, we should be bound by our own decisions in any event. We think that they have settled the doctrine that in towage cases it makes no difference that the tow is in the possession or custody of the tug, and if so, the libellant did not make out a case.

Decree reversed; libel dismissed.

[fol. 414] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

WILLIAM STEVENS, Libellant-Appellee,

vs.

VESSEL WHITE CITY, H. A. SIMPSON, and Another, Claimants-Appellants

DECREE—Filed April 13, 1931

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, reversed, with costs and with directions to dismiss the libel.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 415] [File endorsement omitted.]

[fol. 416] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

PETITION OF LIBELLANT-APPELLEE, WILLIAM STEVENS, FOR REHEARING, OR, IN THE ALTERNATIVE, FOR A CERTIFICATE TO THE UNITED STATES SUPREME COURT FOR INSTRUCTIONS ON CERTAIN QUESTIONS OR PROPOSITIONS OF LAW INVOLVED

To the United States Circuit Court of Appeals for the Second Circuit:

The petitioner above named, William Stevens, respectfully presents this, his petition, for rehearing and reargument of this case, in accordance with the provisions of Rule 26 of the Rules of the United States Circuit Court of Appeals for the Second Circuit, in order that further consideration may be given to certain matters of fact and law, the effect of which, as your petitioner believes, has been overlooked or misapprehended.

If a reargument is denied, the petitioner respectfully requests that this court certify to the United States Su-[fol. 417] preme Court, the following questions or propositions of law, for its answer, with a request for answers or instructions thereon.

1. Was the "White City" in the towage of the "Drifter" a bailee for hire?

2. Does the tow make out a prima facie case of negligence upon proof that the tug received the tow in good condition and delivered the same in a damaged condition without explanation of the circumstances of the damage?

3. Were the owners of the "White City" negligent by reason of the following acts:

(a) By delaying the commencement of the towage to 8 a. m. on October 19th instead of 6 a. m. as agreed;

(b) By tying up at Fisher's Dock without authority instead of proceeding direct to destination which was but a thirty minute trip;

(c) By leaving the "Drifter" unguarded on the night of October 19th while at Fisher's Dock;

(d) By proceeding to Trans-Marine Dock on the morning of October 20th under-manned and without making any effort to obtain the services of Weston or some other laborer.

The appeal herein seeks to review a decree rendered in favor of libellant for damages to a motor boat known as the "Drifter," which was towed by the "White City," from Morris Heights, New York, to Trans-Marine Pier at Port Newark, N. J., where it was delivered in damaged [fol. 418] condition without any explanation of the circumstances under which it became damaged.

This Honorable Court, through Judge Learned Hand, on April 6, 1931, reversed the decree and dismissed the libel holding:

(1) That the "White City" was not a bailee for hire because "a towage contract simpliciter, does not put the tow in bail to the tug."

(2) That no presumption of negligence arises from the fact that the tug receives the tow in good condition and delivers the same in damaged condition without any explanation as to the cause of damage or the circumstances under which the tow became damaged.

Point I

A tug performing a simple towage contract is a bailee for hire and under the modern rule, where chattels are received by a bailee in good condition, and are delivered in a damaged state, a prima facie case of negligence is made, which casts upon the bailee the burden of showing the circumstances surrounding the damage.

Appellant, in the brief and upon the argument, did not urge seriously that there was no presumption of negligence under the circumstances.

Point I of appellant's brief states:

"The appellant, the 'White City' rebutted the presumption (if there was any) that it was negligent."

Counsel for appellant claimed that the presumption of negligence was rebutted by the owners of the "White [fol. 419] City" showing everything that they did and that they were not negligent, and that there was no obli-

gation to explain the cause of the damage (Appellant's brief, pp. 23-25).

Appellant, however, did state that the "White City" was not the bailee of the "Drifter" but that was based upon the assumption that the Consolidated Shipbuilding Corporation, having placed an employee on board the "Drifter," never delivered possession or control thereof to the "White City" (Appellant's brief, p. 10). Since the "White City" had possession and control of the "Drifter" during that towage, it was naturally assumed by us that there was no doubt but that the "White City" was a bailee for hire and that negligence would be presumed by the court.

This court has frequently defined a tug boat performing a simple towage contract as "a bailee for hire."

In McWilliams Bros., Inc. v. Director General C. C. A. (2nd) 271 Fed. 931, Circuit Judge Rogers, writing for the court, said:

"The highest degree of skill is required, for she (the tug) is not a common carrier; neither is she an insurer; *she is merely a bailee for hire.*"

This opinion was concurred in by Judge Manton and the late Judge Ward.

In Doherty v. Pennsylvania R. R. Co., 269 Fed. 959, 962, the foregoing statement was repeated by this court. An ordinary towage contract was defined as a contract of bailment, and the tug as a bailee for hire.

In Hughes on Admiralty, 2nd Ed. it is stated (p. 129):

[fol. 420] "There are some early decisions to the effect that a tug boat is a common carrier but the later authorities have settled thoroughly that it is not, *but only an ordinary bailee liable for ordinary negligence.*"

In 38 Cyc. entitled "Towage" (p. 563) it is stated:

"* * * The owners of a tug are merely *bailees for hire* and as such are bound to exercise skill, care and diligence in everything relating to the work until it is accomplished."

The modern trend of the decisions is to consider a tug boat performing a simple towage contract as being in the same classification with a private carrier or bailee for hire.

To the same effect see The "Princeton," 19 Fed. cases

No. 11433, p. 1342, The "Merrimac," 17 Fed. Cases No. 9478, p. 126; Bust v. Cornell, 24 Fed. 188; The "D. Newcomb," 16 Fed. 274; the "C. R. Sheffer" (C. C. A. 2), 249 Fed. 600; The "Delaware," 43 Fed. (2nd) 852; The "Genessee" (C. C. A. 2nd), 139 Fed. 549; The Seven Sons, 29 Fed. 543.

Since a tug is not a common carrier or insurer, what else could it be other than a bailee for hire?

Most of the recent decisions of this court which have held that there is no presumption of negligence from proof of the loss or injury of the tow, are based upon old decisions of the United States Supreme Court, where the ancient rule was adopted. The more recent decisions of the United States Supreme Court in ordinary bailment contracts, indicate clearly that a prima facie case of negligence is made where the bailee is unable to explain the [fol. 421] circumstances surrounding the loss or injury to the chattel in bail.

In Southern Railway v. Prescott, 240 U. S. 632, 640, the facts were that merchandise in the hands of a warehouseman, and therefore a bailee, was lost in a fire, which fact was shown and also the circumstances of the fire were such as not to raise an inference of lack of reasonable care on the part of the bailee. The court stated (p. 640):

"As it is the duty of the warehouseman to deliver upon proper demand, his failure to do without excuse, has been regarded as making a *prima facie* case of negligence."

In 6 Corpus Juris, page 1158, entitled "Bailments," the distinction between the ancient and modern rule with respect to a presumption of negligence is recognized where it is said:

"Older Rule

"In some of the old decisions it was held that the loss or injury raised no presumption of negligence. * * *

"Modern Rule

"The rule adopted in the more modern decisions is that the proof of loss or injury establishes a sufficient *prima facie* case against the bailee to put him upon his defense. Where chattels are delivered to a bailee in good condition and are returned in a damaged state, or are lost or not

returned at all, the law presumes negligence to be the cause and casts upon the bailee the burden of showing that the loss is due to other causes consistent with due care on his part."

[fol. 422] The modern rule as above stated represents the weight of authority and has been followed by recent decisions in practically every state in the Union.

The above citation from Corpus Juris was followed by this court in The "John Carroll," 275 Fed. 302, C. C. A. 2nd, where Circuit Judge Rogers speaking for the court said (p. 306):

"It is a general rule of the law of bailments that where chattels are delivered to a bailee in good condition and are returned in a damaged state, the law presumes negligence to be the cause, and casts upon the bailee the burden of showing that the loss is due to other causes consistent with due care on his part. 6 C. J., page 1158. While the bailee may overcome this presumption by showing that the loss occurred through some cause consistent with due care on his part, that presumption under the circumstances of this case, was not overcome."

In the opinion filed in the case at bar it is said:

"In the case of charters which are demises, we have often held that redelivery in damaged condition raises a presumption of negligence which the demisee must explain. * * *. *In principle we cannot distinguish between that and the situation at bar* and if free to choose we should follow the decision below. *The reason for imposing a presumption appears to be quite as strong as in demises;* that is, the greater opportunity of the bailee to explain the injury, due to the immediacy of his access to the barge and the bailor's absence. Though a distinction might have [fol. 423] been drawn when a bargee is present, none ever has been, and the only ground we can imagine is that in a demise the period of custody is usually longer, not a satisfactory difference.

"Our own decisions seem to us, however, to have too strongly established an exception to justify a departure now. Whether this has arisen from confusing an ordinary towage contract where the owner or the tow remains in possession with a contract like this where the tow is un-

manned, or manned only by a bargee, we cannot tell. Probably the doctrine generally applicable was carried over to this situation without observing the difference; so far as appears, the anomaly has not hitherto been observed."

We respectfully submit that in principle there is no distinction between damage to a barge under charter, particularly where the bargee is present, and the situation presented in the case at bar. If redelivery of the barge in damaged condition in the former situation raises a presumption of negligence, then surely that presumption should be recognized here.

If the modern rule adopted in recent decisions is followed, this unjust and inequitable distinction can be removed. It is a harsh rule which obligates the owners of a boat such as the "Drifter," to specifically point out negligence on the part of a tug boat which undertakes a contract of towage where the circumstances of damage are not explained.

If the "Drifter," instead of being damaged, was never redelivered because of some unexplained reason which occurred during the night when it was tied up at Fisher's [fol. 424] Dock and while the owners of the "White City" were asleep on their boat, the libellant would be powerless to establish affirmatively any negligence on the part of the "White City" resulting in its loss. It would naturally be against the interest of the bailee to reveal the circumstances of the loss if inconsistent with ordinary care and diligence.

In the case at bar, the failure to impose a presumption of negligence where the circumstances surrounding an injury are not explained, amounts, we submit, with great respect, to a denial of justice, particularly when the owner of the "Drifter" had no representative present at the time of the damage. The owners of the tug boat and its employees by professing ignorance when they might otherwise have full knowledge of the cause of the damage, can defeat a just claim and thus places a premium upon concealment and suppression of evidence.

Modern conditions in the towage of boats in the harbor of New York are vastly different from those which obtained in 1870 at the time of the rendition of the decision of the United States Supreme Court in The "Webb," 14 Wall. 406. That decision followed the rule of law announced in

New York cases such as Wells v. Navigation, 2 N. Y. 204, which rule has since been changed in more recent New York decisions, such as Wintringham v. Hayes, 144 N. Y. 5.

In the latter case, which involved a bailment of a yacht, the Court of Appeals of New York, speaking through Judge Bartlett said:

"In the case at bar if the defendant, in support of his first counterclaim is able to prove the condition of the yacht when delivered to the plaintiff, the nature of the subsequent injuries she sustained, and that they were not [fol. 425] the results of ordinary wear and tear, he will have made out a *prima facie* case and the burden of proof will be shifted to the plaintiff, who, as bailee, had the yacht exclusively within his control and should be able to show the manner in which he discharged his contract obligations in the premises."

In Strauss v. Canadian Pacific Railway Co., 254 N. Y. 407, the court had occasion to discuss early decisions of that court which stated that a contract for the carriage of goods was purely private, in which the public had no concern, and therefore, the carrier could provide in its contract for exemption from negligence.

In departing from those decisions the court said (p. 412):

"While the early decisions in this state expressed the public policy of the state at the time, changed conditions have resulted in a change of the public policy of the state.

"The rule of freedom of contract which reflected the public policy of the state in the days of the canal boat and stage coach have ceased to be applicable under modern conditions."

The forceful language used by Judge Crane as to the function of the law stated in Oppenheim v. Kridel, 236 N. Y. 156, is very appropriate.

The question at issue was whether or not a wife could maintain an action for criminal conversation against her husband's paramour. The defendant urged that such an action could not be maintained because of an ancient rule of law embodied in early decisions. Those early decisions, [fol. 426] however, recognized the right of a husband to

bring such an action. The court in departing from that ancient rule said, speaking through Judge Crane (p. 165):

"In fact, there has been no objection raised anywhere to the right of the wife to maintain the action for criminal conversation except the plea that the ancient law did not give it to her. Reverence for antiquity demands no such denial. Courts exist for the function of ameliorating the harshness of ancient laws inconsistent with modern progress, when it can be done without interfering with vested rights."

And at page 164:

"What is here said about 'natural right' and the 'flexibility of the common law' is equally applicable to an action for criminal conversation. If the husband has such an action, why should not the wife? The reasons for giving the action to the one are as potent for giving the action to the other, as I have above demonstrated. The common law is not rigid and inflexible, a thing dead to all surrounding and changing conditions. It does not expand with reason. The common law is not a compendium of mechanical rules written in fixed and indelible characters but a living organism which grows and moves in response to the larger and fuller development of the nation."

If the law imposes a presumption of negligence in favor of the owner of a barge which is chartered, notwithstanding the fact that that bargee is present, then surely the same protection should be afforded a barge which is being towed [fol. 427] pursuant to a simple contract of towage. This court has recognized that no distinction in principle can be observed. If that be so, the hands of justice should not be tied by ancient decisions that have outlived their usefulness. A departure from this ancient rule embodied in outworn precedents will entirely remove this unreasonable distinction and afford relief not only to this libellant but settle the law for the future.

Decisions of other Federal Courts outside this Circuit indicate that a prima facie case of negligence is made out where a tug receives a tow in good condition and red-livers it in damaged condition, where the cause of damage is not definitely known.

See Great Lakes Towing Co. v. Alve, C. C. A, 7, 261 Fed. 261; Susquehanna v. East. (D. C. Mass.), 200 Fed. 317;

Burr v. Knickerbocker (C. C. A. 1st), 132 Fed. 248; Gilchrist v. Great Lakes Towing Co. (E. D. N. J.), 237 Fed. 432; Vessel Owners Towing v. Wilsa (C. C. A. 7), 63 Fed. 626; The "Delaware," 43 Fed. (2d) 852; Pederson v. John D. Spreckles & Bros. Co., 87 Fed. 938; The Seven Sons (W. D. Penn.), 29 Fed. 543.

In The "Sea Lion" (supra) (N. D. Cal.) 12 Fed. (2d) 124, the court said:

"Libellant's contention is, that even as a bailee required only to exercise ordinary care, respondent is bound to show how the barge was lost, before it can throw upon its owner the burden of proof of negligence, Seven Sons, 29 Fed. 543, 544. This amounts to saying that proof of the loss makes out a *prima facie* case of negligence, and is a correct statement of the law, Jones on Evidence, 2 ed. No. 186; Kalkasha, 107 Fed. 959, 962."

[fol. 428] Point II

There was ample proof of negligence on the part of the owners of the "White City," as well as facts from which the court could reasonably infer that the damage was caused by negligence.

Even if a presumption of negligence did not arise from receipt of the tow in good condition and its delivery in damaged condition, the "White City" was clearly guilty of negligence. The acts of negligence and the law applicable thereto, is discussed at pages 30 to 35 of appellee's brief, and were no doubt overlooked by this court since they were discussed under Point II where it was claimed that the presumption of negligence was not rebutted. An examination of the record will show that the "White City" and her owners were at fault in the following respects:

1. Although the "White City" agreed to be at the Consolidated Shipbuilding Corporation on October 19th at 6 a. m., it did not arrive according to claimant's admission until 8 a. m. (fols. 157-160, 248).

Connolly v. Wilkes, 23 Barb. 539.

2. Claimants arrived at Fisher's Dock at 3:30 p. m. on October 19th and without authority tied up at said place overnight without proceeding direct to destination, which was but a thirty-minute trip (fols. 260-263, 301).

3. During the night of October 19th the "Drifter" was not guarded by a watchman, during which time the claim-[fol. 429] ants were asleep on the "White City" (fol. 263).

The Valentine, 131 Fed. 352;

Washington Tug & Barge Co. v. Weyerhaeuser Timber 22 Fed. (2) 665.

4. Although Simpson testified that the "Drifter" was tied alongside Fisher's Dock and that bumpers were put out to prevent the boat banging or scratching against the dock, it was not shown in what manner this boat was moored and particularly, if the "Drifter" was lighted during the night.

5. On the following morning the "White City" proceeded with her tow to Trans-Marine Dock without making any effort to telephone Consolidated Shipbuilding Corporation to obtain the services of Western or some other laborer (fol. 310).

Thus the "White City" was left without a lookout since Rhodes was operating the "White City" and Simpson was back on the "Drifter" (fol. 310).

During the night of October 19th, while the "Drifter" was tied up at Fisher's Dock without any authority from the owner or its agent, and without any one to watch it during the night or to slacken its lines if necessary, it is possible that damage at that time occurred.

She might have been rammed by some other boat or if the lines were not slackened and the tide receded she might have been hanging on the side of the dock as the result whereof, a pile might have stove a hole in her side.

In The Valentine, 131 Fed. 352, the lighter was tied up to Pier 42, N. R., at a time when there was much ice in the river. During the night the bailee left no one in charge [fol. 430] except a cook, deckhand and fireman, who were asleep. During the night the boat sank. The court said:

"During the night the boat was practically deserted; she was substantially without a crew; *she had no watchman* in any proper sense. The equipment for pumping the water was valueless since it was inoperative. The negligence in the care of the cargo was gross."

In Washington Tug & Barge Co. v. Weyerhaeuser Timber Co., 22 Fed. (2) 665 (C. C. A. 9) an action was

brought by Weyerhaeuser Lumber Co., the owner of a lumber barge, W. T. No. 17, against Brady & Ketcham Lumber Company, who in turn impleaded the Washington Tug & Barge Co., who towed said barge, on the theory that it was primarily at fault. A decree was rendered against the Tug & Barge Company because of its negligence in leaving the barge unguarded by any watchman and leaving no lights exposed. The court said in affirming the judgment:

"No watchman was left with the barge, and the court found that no lights were exposed. The Tugboat Company made no report either to the Williams Steamship Company or to Brady & Ketcham as to where it had moored the barge, or in what condition it left it. After so leaving it, it took no further concern in respect to it until about 12 o'clock, noon, next day, at which time on being requested to put it alongside the Eagle it learned that it was gone from the dock."

It was subsequently found damaged and the court continued:

[fol. 431] "How the barge escaped its moorings or was damaged is in a measure left to remote inference, if not speculation. If, however, the Tugboat Company was negligent in the respects found by the lower court upon evidence deemed to be sufficient, it is a fair conclusion that such negligence was the proximate cause of damage. 'I think' said the court, 'the Tug and Barge Company was negligent in leaving the scow at the Spokane Street dock without permission, and without a watchman in the absence of this permission, even though the place was the privileged place of the S. S. Eagle.'"

The court remarked that from the evidence, which was conflicting, the trial court might reasonably have drawn a contrary conclusion since there was no direct evidence to support the findings that no lights were exposed. Nevertheless the court said:

"While there was a want of direct and affirmative evidence to support the finding that no lights were exposed, we do not think the finding was unwarranted. Under the circumstances, the natural burden was on the Tugboat

Company to show that it exercised reasonable care for the protection of the barge, and if it exposed lights knowledge of the fact was in its possession and not in the possession of either of the other parties. It not only refrained from making such proof, but on the other hand offered to show that it was under no obligation in the premises."

Although Simpson testified in answer to a leading question of his counsel that on the morning of October 20th [fol. 432] he looked over the "Drifter" and found her to be "in perfect condition" and that he "could not see anything wrong anywheres," it was proven on cross examination that he never made any such inspection (fols. 266, 305).

On cross examination Simpson testiled (fol. 305):

"Q. On the morning of October 20, what did you do?

"A. I was on the 'Drifter.' I went aboard the 'Drifter' to steer her like Captain Weston was doing before.

"Q. You were on the 'Drifter'?

"A. I was on the 'Drifter,' yes.

"Q. Did you do anything else?

"A. No, sir.

"Q. You went to the 'Drifter'?

"A. Yes, sir.

"Q. And steered her?

"A. Yes, sir.

"Q. *And that is all you did from the time you got up that morning?*

"A. *Yes, sir.*"

Thus it appears beyond doubt that no inspection was made by Simpson on the morning of October 20th before the "Drifter" left Fisher's Dock. It is, therefore, reasonable for the court to infer that the damage occurred during the night of October 19th when the "Drifter" was not guarded and probably unlighted. How could the appellant otherwise account for the damage when the trip from Fisher's Dock to destination was but five or six miles?

Simpson was demonstrated to be a very unreliable and untruthful witness. Surely, this witness who stated that the "Drifter" was delivered in good condition, when he knew a damaged receipt was accepted, could hardly be be-

lieved, particularly in the light of his testimony on cross-examination.

From the character of damage sustained to The Drifter the court might reasonably infer that the act which caused [fol. 433] it was the result of negligence. In The Kalkasha, 107 Fed. 959 (C. C. A. 7), the court said, speaking through Judge Jenkins:

"Although it may be said, the burden is upon the one alleging breach of contract of towage to show negligence or unskilfulness to his injury in the performance, still in some cases 'the result is a safe criterion about which to judge of the character of the act has caused it.' The Webb, 14 Wall. 406."

It is earnestly submitted that there was affirmative proof of negligence on the part of the owners of the "White City" in the performance of towage, and surely there were facts established from which the court could reasonably infer that this damage was not caused by any act consistent with due care. The nature of the damage was "a safe criterion about which to judge of the character of the act that caused it." The Webb, 14 Wall 406.

Point III

Since the appellant unreasonably enhanced the expenses of printing the record by the inclusion of the proceedings before the Special Commissioner on the assessment of damages, when no point was made either in the brief or on the argument that the report of the Special Commissioner was erroneous, it is respectfully urged at all events, that the dismissal of the libel be without costs.

An examination of the printed record, which consists of two volumes, shows that the appellant printed 164 pages of testimony taken before the special commissioner, to- [fol. 434] gether with many exhibits offered at the hearings before said commissioner, and the report of John L. Galey, special commissioner, under the guise of challenging the correctness of the report before this court. Of course, counsel for the appellant knew full well in advance of printing the record, that this point would not be made. No

where in the appellant's brief or on the argument was any reference made to the correctness of the report of the special commissioner or his rulings on the various hearings.

The reason for printing this testimony which was wholly unnecessary to present the real points at issue, was simply to cite to this court an expression of opinion by a surveyor by the name of Jolly before the special commissioner as to the cause of the damage. This testimony of Jolly which appears at folios 428 to 446, is set forth fully in the appellant's brief on pages 21 and 22, and no where is it found in the testimony given by this witness when he appeared upon the trial before Judge Woolsey.

It, of course, was highly improper for the appellant to endeavor to bolster up his case by a reference to testimony not given before District Judge Woolsey on the merits. It thus appears that this expense was incurred for an improper purpose and in the interests of justice it is respectfully urged that the court should not impose this expense upon the libellant. Not only will the libellant under the mandate of this court, have to pay the printing expenses of the testimony taken before the special commissioner, but he has already been required to pay for the stenographic minutes and cannot be reimbursed unless this court affords relief at this time. It is, therefore, respectfully urged that the stenographic expenses involved in obtaining the testi- [fol. 435] mony on the hearing before the special commissioner and the printing expenses involved herein, should be assessed against the claimants and their counsel.

Point IV

If the petition for rehearing is denied it is respectfully requested that the court certify questions to the United States Supreme Court for the purpose of settling the law on this subject.

Since the questions involved have not been passed upon by the United States Supreme Court within the last fifty years during which time conditions in commerce and navigation have greatly changed, it is respectfully urged that if the court feels bound to follow the ancient rule, it should certify the questions enumerated in the petition to the Supreme Court.

It is apparent from the decision of the Supreme Court in Southern Railway v. Prescott, 240 U. S. 632, involving the receipt of a chattel by a warehouseman, and its return in damaged condition, that a prima facie case of negligence is regarded as having been made where there is no explanation of the circumstances of the damage. In principle there can be no distinction between that situation and that where a tug performing a simple contract of towage receives a barge in good condition and makes delivery in damaged condition without explanation, particularly where the owner or representatives of the barge are not present.

It is well settled that a presumption of negligence is imposed upon a tug receiving a barge under charter and making delivery in damage- condition, notwithstanding the fact [fol. 436] that the barge is manned by the owner thereof. Were it not for the decision of the Supreme Court in The "Webb," 14 Wall. 406, it is doubtful whether any distinction would be made.

This court said:

"In the case of charters, which are demises, we have often held that redelivery in damaged condition raises a presumption of negligence which the demisee must explain * * *. In principle we cannot distinguish between that and the situation at bar and if free to choose, we should follow the decision below. The reason for imposing a presumption appears to be quite as strong as in demises; that is, the greater opportunity of the bailee to explain the injury due to the immediacy of his access to the barge and the bailor's absence."

Because of the conflict on the point involved, as found in decisions in other Circuit courts and State courts, and the uncertainty that now prevails, it is of great interest to settle the law beyond any doubt to meet the changes in transportation and commerce that have occurred during the last fifty years since the rendition of the decision of the Supreme Court in The "Webb," 14 Wall. 406.

It is very likely that if this question is again submitted to the Supreme Court, the distinction aforementioned will be entirely removed by a clear departure from the ancient rule of law. If the common law is not rigid and inflexible, but does expand with reason to meet changing conditions, then surely, reverence for antiquity will not prevent the

court from ameliorating the harshness of ancient laws inconsistent with modern progress.

[fol. 437] Conclusion

For the reasons above set forth, the petitioner prays for a rehearing in order that the reversal of this decree may be reconsidered, or, in the alternative this court will certify for answer to the United States Supreme Court the questions here involved.

Dated New York, N. Y., April 20, 1931.

Neil P. Cullom, Counsel for Petitioner.

I hereby certify that the foregoing petition for rehearing is filed in good faith and not for the purpose of delay, and is in my judgment meritorious and well-founded.

Neil P. Cullom.

[fol. 438] In United States Circuit Court of Appeals for the Second Circuit

William Stevens, Appellee,

against

The Vessel "White City," Her Engines, etc., Appellant

Before Manton, L. Hand and Chase, Circuit Judges

Neil P. Cullom, Esq., for the petitioner.

Per Curiam:

Petition denied.

M. T. M., L. H., H. B. C., U. S. Circuit Judges.

[fol. 439] Filed April 23, 1931. William Parkin, Clerk.

[fol. 440] In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Order Denying Petition for Rehearing—Filed April 30, 1931

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof it is

Ordered that said petition be, and hereby is, denied.

Wm. Parkin, Clerk.

[fol. 441] [File endorsement omitted.]

[fol. 442] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 443] Supreme Court of the United States

Order Allowing Certiorari—Filed October 19, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,031. U. S. Circuit Court of Appeals, Second Circuit. Term No. 217. William Stevens, petitioner, vs. The Vessel "White City," her engines, tackle, apparel, etc. Petition for a writ of certiorari and exhibit thereto. Filed July 10, 1931. File No. 36,031.

FILE COPY

FILED
JUL 10 1931
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

JUNE TERM, 1931—No. 217

WILLIAM STEVENS,

Petitioner,

against

The vessel "WHITE CITY," her engines, tackle, apparel, etc.,

Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI.

WILLIAM F. PURDY,
NEIL P. CULLOM,
JAMES E. FREEHILL,
Counsel for Petitioner.

HENRICKS & LUDEMANN, INC., New York City

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IN THE

Supreme Court of the United States

JUNE TERM, 1931—No.

WILLIAM STEVENS,
Petitioner,

against

The vessel "WHITE CITY," her engines, tackle, apparel, etc.,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

I. Your petitioner respectfully prays for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review the decision rendered April 6, 1931, which reversed a decree of the United States District Court, Southern District of New York, entered April 14, 1930, after a trial in admiralty before Judge John M. Woolsey in favor of the libellant (petitioner) in the sum of $1,410.35, and dismissed the libel (pp. 328-329).

II. Certified copy of the entire transcript of the record of the case is submitted herewith.

III. The petitioner (libellant) instituted this action by filing of a libel and complaint against the respondent (vessel "White City") for damages sustained to a motor yacht, the "Drifter," arising out of a breach of a contract of towage (pp. 4-7).

IV. The answer is in effect a general denial (pp. 8-24).

V. A decision was rendered in favor of libellant after a trial in admiralty before District Judge John M. Woolsey, and after assessment of damages before the special commissioner, a final decree was entered April 14, 1930 in the sum of $1,410.35 (pp. 311, 328, 329).

VI. The Circuit Court of Appeals reversed the decree on April 6, 1931. The opinion of the court was written by Circuit Judge Learned Hand. The court based its reversal upon the fact that although the motor yacht "Drifter" was delivered in good condition to the tug "White City," and was returned in damaged condition with no explanation of the circumstances under which it became damaged, nevertheless, there was no liability because a tug is not a bailee for hire and no presumption of negligence arises where tug receives a tow in good condition and delivers it in damaged condition. It was recognized that a presumption of negligence arises where the tow is under charter and that, in principle, the court stated it could not "distinguish between that and the situation at bar," because "the reason for imposing a presumption appears to be here quite as strong as in demises; that is, the greater opportunity of the bailee to explain the injury, due to the immediacy of his access to the barge and the bailor's absence." The court felt, however, that their decisions had "to strongly established an exception to justify a departure now," notwithstanding decisions to the contrary in other circuits.

VII. The petitioner is advised and believes that said decision of the Circuit Court of Appeals in this case is erroneous and that this Honorable Court should require the case to be certified for its review and determination in conformity with the provisions of section 240, Judicial Code.

VIII. Petitioner submits the following reasons why the judgment of the Circuit Court of Appeals reversing the

decree of the United States District Court should be brought here for review by this Honorable Court:

(1) Because the Circuit Court of Appeals has held that a tug performing a simple contract of towage is not a *bailee for hire,* even though the barge is in the exclusive possession and custody of the tug and no servant of the owner of the tow is present at the time the damage to the tow occurs. This is in conflict with the law of towage, as expressed in previous opinions of that court, as well as in opinions expressed by Federal Courts in other circuits (*McWilliams Bros., Inc.* v. *Director General,* C. C. A. [2nd], 271 Fed. 931, 932; *Hughes* on *Admiralty,* 2nd Ed. p. 129; 38 Cyc., title "Towage," p. 563; *The "Princeton,"* 19 Fed. Cases No. 11433, p. 1342, The *"Merrimac,"* 17 Fed. Cases No. 9478, p. 126; *Bust* v. *Cornell,* 24 Fed. 188; *The "D. Newcomb,"* 16 Fed. 274; *The "C. R. Sheffer"* [C. C. A. 2], 249 Fed. 600; *The "Delaware,"* 43 Fed. [2nd] 852 [D. C. E. D. Penn.]; *The "Genessee"* [C. C. A. 2nd], 139 Fed. 549; *The Seven Sons,* 29 Fed. 543).

(2) Because the Circuit Court of Appeals has held that in an action for breach of a contract of towage, a prima facie case of negligence is not made out against the tug, where it receives a tow in good condition and redelivers it in damaged condition, where the circumstances of the damage are not shown, even though the tow be unmanned at the time of the damage by a servant or bargee employed by the owner. This, we submit, is in conflict with the law of bailments as expressed in the opinion of this Honorable Court and in conflict with the law of towage as laid down by the Circuit Court of Appeals in other circuits (*Southern Railway* v. *Prescott,* 240 U. S. 632, 640; 6 *Corpus Juris,* p. 1158).

(3) Because the opinion of the Circuit Court of Appeals in this action is in conflict with the decided weight of authority and with the well settled law of New York (38 Cyc. Title "Towage," p. 563; 6 *Corpus Juris,* p. 1158,

Title "Bailments"; *Wintringham* v. *Hayes,* 144 N. Y. 5, and cases cited above), and the decision will create uncertainty in a branch of the fundamental law of contracts of towage, where certainty is a vital factor.

(4) Because the Circuit Court of Appeals erred in holding:

(a) That the tug "White City" was not a bailee for hire;

(b) That no presumption of negligence arises where a tug receives a tow in good condition and delivers it in damaged condition without an explanation of the cause or circumstances of the damage, and

(c) In failing to draw an inference of negligence by reason of the failure of the owners of the tug to comply with the terms of the contract and, particularly, in failing to guard the "Drifter" during the night of October 19th when it was moored at Fisher's Dock.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue and that your petitioner have such other and further relief as to this Honorable court may seem just.

WILLIAM STEVENS,
Petitioner.

WILLIAM F. PURDY,
NEIL P. CULLOM,
JAMES E. FREEHILL,
Counsel for Petitioner.

I hereby certify that I have examined the within petition and in my opinion it is well founded and entitled to favorable consideration, and is not filed for the purpose of delay.

WILLIAM F. PURDY,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES,

JUNE TERM, 1931—No.

WILLIAM STEVENS,
Petitioner,
against
The vessel "WHITE CITY," her engines, tackle, apparel, etc.,
Respondent.

BRIEF IN SUPPORT OF PETITION.

This is a petition, pursuant to Section 240, Judicial Code, for a review of the decision and the decree of the United States Circuit Court of Appeals for the Second Circuit, reversing a decree in Admiralty of the United States District Court for the Southern District of New York and dismissing the libel.

The material facts and the questions involved have been briefly stated in the petition and need not be repeated here.

The opinion of District Judge John M. Woolsey in the lower court is unreported and the opinion of the United States Circuit Court of Appeal is reported 1931 A. M. C. 1844 (not otherwise reported).

The Facts.

On October 13, 1925, Roos, an employee of the Consolidated Shipbuilding Corporation, had a telephone conversation with Alexander Simpson, father of one of the respondents, in which an arrangement was made for the

towage of the motor boat "Drifter" by a boat called the "Hilda." This conversation was confirmed by a letter of said date which reads as follows (p. 53):

"October 13, 1925.

Mr. Alec Simpson,
151st St. & Hudson River,
New York City.

Dear Alec:

Confirming our telephone conversation of this day, and agreement, please have your work boat 'Hilda' here at our works on Monday morning, the 19th at 6 a. m. to tow 45' launch on cradle from Morris Heights to the Trans-Marine Steamship Company, alongside of steamer 'Suscolanco' at Port Newark, N. J. See Captain Lewis on arrival at pier. It is important that this boat arrive at the steamer before 3 P. M. that day.

Yours very truly,

CONSOLIDATED SHIPBUILDING CORPORATION,
W. A. ROOS, JR.,
WAR:T Sales Dept."

Subsequent to the receipt of this letter and prior to October 19, 1925, Roos was advised that the "Hilda" was not available, but that another boat known as the "White City," owned by Simpson's son and son-in-law, would do the towing (pp. 54, 55). The substitution was agreed to prior to the morning of October 19th, 1925, and again Roos advised that the boat must be there at 6 a. m. on October 19th, 1925 (p. 54).

It was admitted that the "White City" did not arrive at 6 a. m. but came there at 8 a. m. Employees of the Consolidated Shipbuilding Corporation assisted in attaching

the "Drifter" to the "White City" by a 40 foot rope and, by another rope, attached the cradle to the stern of the "Drifter." The boat was owned by T. C. Frost and was at his risk during the towage (pp. 64-70).

The Consolidated Shipbuilding Corporation put one of its laborers (Weston) on the "White City" to tend to the lines when she would be alongside the steamer to which it was to be delivered by the "White City." Weston was not a licensed captain but merely a general handyman around the dock and did not operate the "Drifter" since it had no motor power (pp. 58, 59, 61, 62 and 66).

It was conceded that the "Drifter" was in good condition when it was received (pp. 71, 78).

The "White City" with its tow, proceeded along the Harlem River and down the East River until it reached Hell Gate when the cradle to the stern of the "Drifter" became detached and a delay of fifteen to twenty minutes occurred, because it was necessary to again attach the cradle (pp. 85-87). No damage occurred to the "Drifter," at that time.

Thereafter the "White City" with its tow continued down the East River, across the bay, through Kill van Kull, into Newark Bay, where the "White City" sighted the s. s. "Suscalanco," on which boat the "Drifter" was to be shipped (p. 87).

Simpson testified that this was 5 p. m. but the answer fixes the time as 3:30 p. m. (pp. 15, 87). The claimant, instead of proceeding direct to destination, proceeded to Fisher's Dock at Bayonne, N. J., although it was but a thirty minute trip to the Trans-Marine dock (pp. 87, 88, 101). The "White City" and its tow were tied alongside of Fisher's Dock where it is stated by Simpson that big rubber tires or fenders were put out to keep the "Drifter" from banging or scratching against the dock. It was not shown which side was nearest Fisher's Dock, nor how the boat was moored or whether lights were put on the boat

during the night. *During the night it was not guarded by any watchman.*

Simpson testified that at Fisher's Dock claimant Rhodes telephoned the Consolidated Shipbuilding Corporation and was unable to speak to anyone in authority except a watchman who had told him "to bring the boat back" (p. 87). Simpson also stated that Rhodes thereupon telephoned his father-in-law, Alexander Simpson, who he claims told him that the "Drifter" was to go on another steamer because the orders were changed; that he "should take the boat to Port Newark, that next day, or as soon as we could get there" (pp. 87, 88).

Alexander Simpson testified that he could not remember any such conversation with his son-in-law, Rhodes (Supp. Vol. p. 18). Rhodes was then asked by Weston if he could not go home that night, to which he replied (Supp. Vol. fol. p. 28):

> "I didn't see any reason why he should stay. As far as I was concerned, I didn't see any reason either why he should stay. It wasn't my business to know any reason."

When asked if he told Weston to go home he stated, "I told him he could go home" (Supp. Vol. p. 47).

It is conceded that on the morning of October 20th, 1925, when the tug with its tow proceeded to destination, that no request was made by respondent to the Consolidated Shipbuilding Company for Weston or any other laborer (p. 104).

During the night of October 19, 1925, while the "White City" and its tow was moored to Fisher's Dock, the claimants slept on the "White City" leaving no one to watch the "Drifter" (pp. 88, 100). No account is given of what happened on the night of October 19, 1925, while the "Drifter" was at Fisher's Dock.

Although Simpson stated that on the morning of October 20th he looked over the "White City" and the "Drifter," and that they were in perfect condition, because he "could not see anything wrong anywheres" it is obvious that he made no inspection because on cross examination he was asked particularly what he did that morning, and he stated that he went aboard the "Drifter" to steer her, and that he did not do anything else from the time he got up that morning until he went on the "Drifter" (pp. 89, 102).

The "White City" with its tow arrived on the morning of October 20th, 1925 at Trans-Marine Pier, at Port Newark, New Jersey, at about 7:30 to 8:00 a. m. The weather was clear and the sun was shining (p. 72).

Although the respondent denied in its answer and vigorously contended on the trial that the "Drifter" was not damaged in its possession, the trial judge stated that he believed the libellant's witnesses who said that the "Drifter" was damaged when it arrived, which was corroborated by the damage receipt taken by the owners of the "White City" without protest (p. 309).

This finding was approved by the Circuit Court of Appeals, which stated:

> "We see no reason to question the conclusion that the hole was made during the trip, and we dispose of the case upon that assumption."

Bauer, who saw the "Drifter" coming toward the dock, stated that he saw "a hole stove in her, midship, right above waterline" and that upon examination "there were five planks gone in her" (pp. 71, 72).

The trial judge found "that neither Rhodes nor Simpson (owners of the tug) could explain what, how or where the damage happened," which finding was expressly approved by the Circuit Court of Appeals (p. 309).

With respect to the claim made by the owners of the "White City" that the damage was caused by driftwood, Judge Learned Hand said:

> "They suggested that a piece of driftwood, of which there was much in the bay at that season, might have stove in the yacht's side, but this was merely an assumption."

The testimony of the respondent was characterized in the opinion of the Circuit Court of Appeals as "to scanty to meet this test," to wit, of explaining how the injury occurred or else that it was not caused by neglect.

POINT I.

A tug performing a simple towage contract is a bailee for hire, particularly where the tow is manned only by a servant or bargee who is not present during the period when the damage to the tow takes place.

District Judge Woolsey, an eminent authority on admiralty matters, found that under the facts of this case, the "White City" was a bailee for hire.

The United States Circuit Court of Appeals, however, relying on the decision of this court in the steamer, *"Webb,"* 14 Wall. 406, held otherwise, stating:

> "There is no doubt that a towage contract, simpliciter, does not put the tow in bail to the tug."

This statement of law is erroneous and contrary to that court's previous decisions.

In *McWilliams Bros., Inc.* v. *Director General*, C. C. A. (2nd) 271 Fed. 931, 932, Circuit Judge Rogers, writing for the court, said:

> "The highest degree of skill is not required, for she (the tug) is not a common carrier; neither is she an insurer; *she is merely a bailee for hire.*"

This opinion was concurred in by Judge Manton and the late Judge Ward.

In *Hughes on Admiralty,* 2nd Ed. it is stated (p. 129):

> "There are some early decisions to the effect that a tug boat is a common carrier but the later authorities have settled thoroughly that it is not, *but only an ordinary bailee liable for ordinary negligence,*"

In *Brinton and Drifting Barges,* 1931 A. M. C. 852 (not otherwise reported), the Circuit Court of Appeals for the Second Circuit held that the Pennsylvania Railroad was a bailee where it maintained a mooring rack at South Amboy, for the delivery of barges to be loaded with coal. The court said (p. 857):

> "As to the barges themselves there was, however, such a duty. The road was a bailee. (Citing cases.) The relation is analogous to that of a tug which temporarily moors a barge en route, or at the end of the voyage, *Bouchard* v. *Pa. R. R. Co.,* 1925 A. M. C. 486, 6 Fed. (2d) 362 (2 C. C. A.); *McWilliams* v. *Davis,* 1923 A. M. C. 29, 285 Fed. 312 (2 C. C. A.); *Howard,* 252 Fed. 85 (2 C. C. A.). Though it does not appear that the road towed all the barges from New York to South Amboy, that in our judgment made no difference. The rack was the place fixed by the road for the delivery of barges to be loaded and then put into its tows. Nobody could expect an owner's tug to stand by until at the road's convenience it should take a barge out to be laden. Nor is it reasonable to suppose that nobody should meanwhile be responsible for its care, being itself helpless. We hold that the road received the boats as bailee and became responsible for a bailee's care until they were delivered."

During the towage to Fisher's Dock, no damage to the "Drifter" occurred, and while the "Drifter" was being

towed to that point there was on board a colored laborer, an employee of the Consolidated Shipbuilding Corporation, which built the "Drifter," who had nothing to do with the operation of the "Drifter" since it had no motor power (pp. 58, 59, 61, 62, 66).

Roos who made the contract for the towage, on cross examination, testified that Weston was a laborer employed as a general handy man around the dock and that *he did not have charge* of the "Drifter."

The record on this point reads as follows (pp. 58, 59, 61, 62):

> "Q. Why was he (Weston) placed there (on the 'Drifter')? A. Because it is the usual custom to have a man go alongside of the steamer to take a line on the dock, and see that the boat is fended off the dock.
>
> "Q. And to take care of the boat while it is being conveyed? A. He has nothing to do with that."

There is no question but that the "Drifter" was in the possession and under the custody of the tug "White City" during the towage, and particularly between the time the tug arrived at Fisher's Dock and the time when it was delivered at destination, because during this latter period Weston was not on board, having left the "Drifter" when she arrived at Fisher's Dock with the express consent of the owners of the tug "White City." This statement is supported even in the opinion of the Circuit Court of Appeals, wherein it stated:

> "She took the yacht and cradle upon a hawser and started out, there being no one on the tow except a servant of the builder, whose duties were no different from those of the ordinary bargee, and whom we shall consider as such. * * * The bargee (after the 'Drifter' arrived at Fisher's Dock) not wishing to stay aboard, announced that he would leave, to which the master of the 'White City' did not object, and he left."

The master of the "White City" testified that Weston asked permission to go home, to which he consented (Supp. Vol., pp. 27, 28).

The testimony of the master on this point is (Supp. Vol., p. 47):

> "Q. You sent Fred Weston home, didn't you, when you got to Fisher's Dock? A. I didn't send him home, no.
>
> "Q. You told him to go home? A. I told him he could go home."

It is apparent that Judge Hand misinterpreted the language of this court in the steamer *"Webb,"* 14 Wall. 406 (1871). Nowhere in that decision did the court state that a tug was not a bailee for hire. The court said, speaking through Judge Strong:

> "It must be conceded that an engagement to tow does not impose either an obligation to insure or the liability of common carriers."

This is far different from holding that a tug is not a bailee for hire or that an engagement to tow is not a bailment.

In *Transportation Line* v. *Hope* (1877), 95 U. S. 297, also relied upon, this court particularly pointed out that the tug did not have exclusive control of the tow, nor exercise any dominion over the protection of the tow and its cargo.

This court said (p. 300):

> "The transportation company * * * did not have exclusive control of the barge * * * nor did it exercise that internal control of its cargo, its storage, its protection and the like which belong to a bailee * * *."

In the case at bar, however, the tow carried no cargo but was merely a pleasure boat. It was in exclusive possession and under the control of the tug. During the night of October 19, 1925, no representative of the owner of the "Drifter" was present. It was moored to the dock by the owners of the "White City" whose duty it was to protect it from damage.

Since a tug is not a common carrier or insurer, what else could it be, other than a bailee for hire? The "White City" made a contract to receive the "Drifter" at the Consolidated Shipbuilding Corporation yard and to deliver it alongside the S. S. "Suscalanco" at Trans-Marine Dock at Port Newark, New Jersey. The contract provided for no exception of any character, nor did it limit the obligation of the tug to safely deliver the "Drifter" (p. 53).

In *The Princeton,* 19 Fed. Cas. 11433 at page 1342, the court said:

> "I think the owners of a towing vessel have not imposed on them by law any higher obligation than that of bailees for hire * * *."

In *Bust* v. *Cornell,* 24 Fed. 188, a tug was towing a canal and pile driver, which became loose because of defective cleats. The pile driver had no crew. Whether or not the canal boat had a crew, did not appear in the opinion. The court, in describing the obligation of the tug, stated:

> "They were bailees for hire, having life and property in their keeping."

In the *D. Newcomb,* 16 Fed. 274 (W. D. Penn.), it was necessary to define the obligation of a tug performing a simple towage contract. The court stated:

> "They were bailees for hire."

In *Sturgis* v. *Boyer*, 65 U. S., 23, this court stated that a tug performing a stowage contract has exclusive control, direction and management of its tow, even when the tow has on board a mate or stevedore at its wheel.

In *The Delaware*, 43 Fed. (2) 852, District Judge Kirkpatrick stated:

> "It has been held that the owner of a tug to whom a vessel has been delivered under an ordinary contract of towage is a bailee for hire."

In the foregoing case, the court expressly approved the decision of District Judge Woolsey in this case stating that his opinion represented a correct statement of the law.

In the *Genesee*, 139 Fed. 549, C. C. A. (2) a contract of towage was stated to be a contract of bailment and that the obligation of the tug was that of a bailee for hire.

In *The Seven Sons* (District Court, W. D. Pa.), 29 Fed. 543, the court stated:

> "Now, here, the owners of the tug boat were bailees for hire of the flat boat."

In *Newport News Shipbuilding and Dry Dock* (C. C. A. 4 [2]) U. S. 34 Fed. (2) 100, the court said:

> "The loss was due to fire which broke out upon a vessel delivered to the bailee for repairs, in a part of the vessel where only employees of the bailee were present."

It seems quite clear by the overwhelming weight of modern authority that a tug which takes possession of a tow under a contract of towage is a bailee for hire, particularly where during a part of the towage, no one representing the owner of the tow is present when damage occurs. In the case at bar, there is no question that from

the time the "Drifter" arrived at Fisher's Dock and stayed over night, and the time of arrival at destination, no representative of the owner of the "Drifter" was present, and therefore, it was impossible for anyone other than the owners of the tug to know the circumstances under which the "Drifter" became damaged. Can the owners of the tug be heard to say that they did not have exclusive possession and control of the "Drifter" after she arrived at Fisher's Dock, at which time Weston, the laborer, was permitted to go home?

POINT II.

Where a bailee for hire receives chattels in good condition and delivers the same in a damaged state, a prima facie case of negligence is made, which casts upon the bailee the burden of showing the circumstances surrounding the damage.

If the obligation of the "White City" is that of a bailee for hire, there can be no question but that the principle above stated is a correct statement of the law.

In *Southern Railway* v. *Prescott*, 240 U. S. 632, 640, the facts were that merchandise in the hands of a warehouseman, and therefore a bailee, was lost in a fire, which fact was shown and also the circumstances of the fire were such as not to raise an inference of lack of reasonable care on the part of the bailee. The court stated (p. 640):

> "As it is the duty of the warehouseman to deliver upon proper demand, his failure to do without excuse, has been regarded as making a *prima facie* case of negligence."

In *6 Corpus Juris*, page 1158, entitled *"Bailments,"* the distinction between the ancient and modern rule with respect to a presumption of negligence is recognized where it is said:

"Older Rule

"In some of the old decisions it was held that the loss or injury raised no presumption of negligence. * * *

"Modern Rule

"The rule adopted in the more modern decisions is that the proof of loss or injury establishes a sufficient *prima facie* case against the bailee to put him upon his defense. Where chattels are delivered to a bailee in good condition and are returned in a damaged state, or are lost or not returned at all, the law presumes negligence to be the cause and casts upon the bailee the burden of showing that the loss is due to other causes consistent with due care on his part."

The foregoing rule was recently announced by the Circuit Court of Appeals in *Cummings* v. *Pennsylvania Railroad,* 45 Fed. (2) 152, 153 as follows:

"The law on the subject was later correctly stated in the charge as follows:

"'If the jury find from a preponderance of all of the evidence that plaintiff's barge was in tight, staunch, strong and seaworthy condition when delivered under charter to the Pennsylvania Railroad Company, and was damaged when returned to plaintiff, your verdict must be for the plaintiff, unless defendant shows either how the damage occurred, and, second, that none of defendant's acts caused or contributed to that damage, or, first, everything it did with respect to the plaintiff's barge during the charter period, and, second, that none of its acts were negligent, as I have defined negligence in this charge.'"

The justice of the rule is very apparent because the bailor is usually ignorant in most cases, of the circumstances surrounding the damage to his property when it is in the possession of the bailee.

The Circuit Court of Appeals in refusing to adopt this principle of law in the case at bar, however, recognized its merit because it stated:

> "If free to choose we should follow the decision below."

The court, notwithstanding this, felt constrained to follow its own decisions on what we submit was an erroneous assumption that those decisions unqualifiedly held that a tug was not a bailee for hire.

The cases involving damage to barges under charter manned by a master and crew, where the principle has been applied, were reviewed.

The court said:

> "In the case of charters which are demises, we have often held that redelivery in damaged condition raises a presumption of negligence which the demisee must explain. * * *. *In principle we cannot distinguish between that and the situation at bar* and if free to choose we should follow the decision below. *The reason for imposing a presumption appears to be quite as strong as in demises;* that is, the greater opportunity of the bailee to explain the injury, due to the immediacy of his access to the barge and the bailor's absence. Though a distinction might have been drawn when a bargee is present, none ever has been, and the only ground we can imagine is that in a demise the period of custody is usually longer, not a satisfactory difference.
>
> "Our own decisions seem to us, however, to have too strongly established an exception to justify a de-

parture now. Whether this has arisen from confusing an ordinary towage contract where the owner or the tow remains in possession with a contract like this where the tow is unmanned, or manned only by a bargee, we cannot tell. Probably the doctrine generally applicable was carried over to this situation without observing the difference; so far as appears, the anomaly has not hitherto been observed."

We respectfully submit that in principle there is no distinction between damage to a barge under charter where the bargee is present and the situation presented in the case at bar, particularly where the cause of damage is unknown to the owner of the tow, and when it occurred while none of his representatives were present. If redelivery of the barge in a damaged condition in the former situation, raises a presumption of negligence, then surely, a similar presumption should be indulged in here.

If the modern rule adopted in recent decisions is followed, this unjust and inequitable distinction can be removed. It is a harsh rule which obligates the owners of a boat such as the "Drifter," to specifically point out negligent on the part of a tug boat which undertakes a contract of towage where the circumstances of damage are not explained, and which are unknown to the owner.

If the "Drifter," instead of being damaged, was never redelivered because of some unexplained reason which occurred during the night when it was tied up at Fisher's Dock and while the owners of the "White City" were asleep on their boat, the libellant would be powerless to establish affirmatively any negligence on the part of the "White City" resulting in its loss. It would naturally be against the interest of the bailee to reveal the circumstances of the loss if inconsistent with ordinary care and diligence.

In the case at bar, the failure to impose a presumption of negligence where the circumstances surrounding an in-

jury are not explained, amounts, we submit, with great respect, to a denial of justice, particularly when the owner of the "Drifter" had no representative present at the time of the damage. The owners of the tug boat and its employees by professing ignorance when they might otherwise have full knowledge of the cause of the damage, can defeat a just claim and thus places a premium upon concealment and suppression of evidence.

Modern conditions in the towage of boats in the harbor of New York are vastly different from those which obtained in 1870 at the time of the rendition of the decision of the United States Supreme Court in *The "Webb,"* 14 Wall. 406.

In *The "Webb,"* 14 Wall. 406, the manner in which the tow was damaged was shown and its owner had representatives on board. Since the tug departed from the true course of the voyage, the court stated that it "was enough to devolve upon the tug the duty of explanation."

The court did not say that a presumption of negligence could never arise in a case where a tug received its tow in good condition and delivered it in damaged condition. It merely stated that *ordinarily,* such a presumption did not exist. No doubt the court had in mind a situation of this character where under the circumstances, it would be just and equitable to hold that a prima facie case of negligence was not made out or proof that a tug received its tow in good condition and delivered it in damaged condition, without explanation of the circumstances under which the tow became damaged. This appears from the opinion of Judge Strong, wherein it is stated:

> "Unlike the case of common carriers, damage sustained by the tow *does not ordinarily* raise a presumption that the tug has been at fault * * * but there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it."

The foregoing statement has unfortunately been taken to be an unequivocal statement that under no possible circumstances, would a presumption of negligence ever be drawn against a tug. Many courts have differed on the interpretation of this statement and unless it is clarified confusion and uncertainty will continue to exist.

At the time the *"Webb"* case was decided, it was the rule in New York cases, such as *Wells* v. *Navigation,* 2 N. Y. 204, and *Alexander* v. *Green,* 3 Hull (N. Y.) 9, that no presumption of negligence could ever be drawn against a tug, where it received in good condition, a tow, and delivered it in damaged condition. The rule announced in such cases has now been entirely changed by the Court of Appeals in later cases.

In *Wintringham* v. *Hayes,* 144 N. Y. 5, a yacht was delivered to plaintiff in good condition and returned in damaged condition. Judge Bartlett speaking for the Court of Appeals, said:

> "In the case at bar if the defendant, in support of his first counterclaim is able to prove the condition of the yacht when delivered to the plaintiff, the nature of the subsequent injuries she sustained, and that they were not the results of ordinary wear and tear, he will have made out a *prima facie* case and the burden of proof will be shifted to the plaintiff, who as bailee, had the yacht exclusively within his control and should be able to show the manner in which he discharged his contract obligations in the premises."

The reason for the departure from the ancient rule embodied in earlier decisions, is because of the demands of modern progress in transportation. This is made clear by later decisions of that court.

In *Strauss* v. *Canadian Pacific Railway Co.,* 254 N. Y. 407, the court had occasion to discuss early decisions of that court which stated that a contract for the carriage

of goods was purely private, in which the public had no concern, and therefore, the carrier could provide in its contract for exemption from negligence.

In departing from those decisions the court said (p. 412):

> "While the early decisions in this state expressed the public policy of the state at the time, changed conditions have resulted in a change of the public policy of the state.
>
> "The rule of freedom of contract which reflected the public policy of the state in the days of the canal boat and stage coach have ceased to be applicable under modern conditions."

The forceful language used by Judge Crane as to the function of the law stated in *Oppenheim* v. *Kridel,* 236 N. Y. 156, is very appropriate.

The question at issue was whether or not a wife could maintain an action for criminal conversation against her husband's paramour. The defendant urged that such an action could be maintained because of an ancient rule of law embodied in early decisions. Those early decisions, however, recognized the right of a husband to bring such an action. The court in departing from that ancient rule said, speaking through Judge Crane (p. 165):

> "In fact, there has been no objection raised anywhere to the right of the wife to maintain the action for criminal conversation except the plea that the ancient law did not give it to her. Reverence for antiquity demands no such denial. Courts exist for the function of ameliorating the harshness of ancient laws inconsistent with modern progress, when it can be done without interfering with vested rights."

And at page 164:

> "What is here said about 'natural right' and the 'flexibility of the common law' is equally applicable to an action for criminal conversation. If the husband has such an action, why should not the wife? The reasons for giving the action to the one are as potent for giving the action to the other, as I have above demonstrated. The common law is not rigid and inflexible, a thing dead to all surrounding and changing conditions. It does not expand with reason. The common law is not a compendium of mechanical rules written in fixed and indelible characters but a living organizm which grows and moves in response to the larger and fuller development of the nation."

Decisions of other federal courts outside the Second Circuit clearly indicate that a prima facie case of negligence is made out where a tug received a tow in good condition and delivered the same in damaged condition, where the cause of damage or the circumstances thereof is not shown.

See *Great Lakes Towing Co.* v. *Alve,* C. C. A. 7, 261 Fed. 261; *Susquehanna* v. *East.* (D. C. Mass.), 200 Fed. 317; *Burr* v. *Knickerbocker* (C. C. A. 1st), 132 Fed. 248; *Gilchrist* v. *Great Lakes Towing Co.* (E. D. N. J.), 237 Fed. 432; *Vessel Owners Towing* v. *Wilsa* (C. C. A. 7), 63 Fed. 626; *The "Delaware,"* 43 Fed. (2d) 852; *Pederson* v. *John D. Spreckles & Bros. Co.,* 87 Fed. 938; *The Seven Sons* (W. D. Penn.), 29 Fed. 543.

In *Burr* v. *Knickerbocker* (C. C. A 1st), 132 Fed. 248, it was held:

> "In order to prove negligence, it is not invariably necessary for the libellant to show the specific details of negligence, or account for the exact manner in which the injury is inflicted. When the libellant

proved that the moving of the vessel was in sole charge of the tug, that the schooner's wheel was hard aport, and that on a summer afternoon, with a light breeze and moderate tide, and with nothing to prevent the tug from having such full control of the schooner as would keep her in deep water, she was so towed that she came upon the westerly shore, or upon a well-known rock, before she had gone more than three or four length, a *prima facie* case of negligence was established."

In *Susquehanna* v. *East* (D. C. Mass), 200 Fed. 317, District Judge Dodd said:

"Under such circumstances the fact that the Devon (barge) grounded, raises a presumption that the tug was negligent. * * * The burden is on the tug to explain the cause of the disaster."

In *Gilchrist Transportation Co.* v. *Great Lakes Towing Co.* (E. D. N. J.), 237 Fed. 432, District Judge Haight said:

"* * * The mere happening of an accident may, under such circumstances, raise a presumption of negligence, and cast upon the tug the burden of demonstrating that it was not due to any failure of duty on her part, such as that the action was one of those inevitable occurrences for which no one is to blame. * * *"

In *The "Mason,"* 249 Fed. 718, District Judge Hough said:

"* * * In good weather and harbor waters, a tug in broad daylight put aground a vessel having at the time no motive power of her own, and completely under the control of the tugs. When these facts were

> shown claimant gave no evidence. If negligence is not inferable from such circumstances, it is difficult to imagine anything that could justify the conclusion short of proven intent to injure another's property."

In the case at bar, the "Drifter" was delivered on a fine clear day with a hole stove in its side at midship near the water line and no explanation was offered by the respondent. Under such circumstances, surely an inference of negligence should have been drawn.

In *Vessel Owners Towing* v. *Wilsa* (C. C. A. 7), 63 Fed. 626, a tug permitted a vessel in tow to strike an abutment extending below the level of the water and which had been there for twenty-five years. The court said (p. 63):

> "The collision occurred in broad daylight, and under such circumstances, the fact of the collision creates a presumption of negligence on the part of the tug."

In *The "Delaware"* (E. D. Penn.), 43 Fed. (2) 852, the court held that a prima facie case of negligence was made out by proof that the tow was delivered in good condition and was redelivered in damaged condition, which obligated the tug to go forward with evidence showing circumstances under which the loss of damage occurred. District Judge Kirkpatrick said:

> "Whether this view need be adopted or whether the bailment arising under such contract is *sui generis*, the law in the Federal Courts, as to the responsibility of the tug owner for loss or damage to the tow and as to the burden of proof in causes arising from such loss or damage, is well settled. The measure of the tug owners duty to the tow is ordinary care and diligency. He is not a common carrier, nor an insurer, but is liable only for loss occasioned by his negligence.

In a case of loss or damage, the libellant has a *prima facie* case if he shows that such loss or damage occurred while the subject of the bailment was in the exclusive custody and control of the bailee. This showing, however, merely imposes upon the bailee the duty of going forward with the evidence. It does not, properly speaking, constitute evidence of negligence. When the bailee accepts this duty and shows how the loss occurred, the force and effect of the *prima facie* case disappears. Then, unless it affirmatively appears from the evidence so produced, that the loss was caused by negligence of the bailee, the burden reverts to the libellant (or, perhaps more properly, the burden originally upon him is revived) and it becomes encumbent upon him to produce evidence of negligence on the part of the bailee; otherwise his case fails. The result will be the same, if as in the instant case, the libellant does not choose to rest his case upon proof of delivery and failure to return, but elects to adduce evidence showing the circumstances under which the loss occurred.

"As has been seen, if the tow is in the exclusive possession and control of the tug, it does place upon the tug the duty of going forward with the evidence and showing the circumstances under which the loss or damage occurred."

In the foregoing case the court held that while the tug need not show exactly what caused the damage, it must by evidence show the circumstances thereof. This is a rule that proceeds from reason. If no such obligation was placed on the tug, its owner and employees might otherwise defeat a just claim (by silence and concealment) particularly, where the bailor has no evidence of the circumstances under which its boat became damaged.

POINT III.

Even assuming the correctness of the decision of the Circuit Court of Appeals on the foregoing questions of law, the reversal was erroneous because there was ample proof of negligence on the part of the owners of the "White City" as well as facts from which the court could reasonably infer that the damage was caused by a negligent act.

Even if a presumption of negligence did not arise from the receipt of the tow in good condition and its delivery in damaged condition, the "White City" was clearly guilty of negligence in the following respects:

1. Although the "White City" agree to be at the Consolidated Shipbuilding Corporation on October 19th at 6 a. m., it did not arrive according to claimant's admission until 8 a. m. (pp. 53, 54, 83).

Connolly v. *Wilkes*, 23 Barb. 539.

2. Claimants arrived at Fisher's Dock at 3:30 p. m. on October 19th and without authority tied up at said place overnight without proceeding direct to destination, which was but a thirty-minute trip (pp. 87, 88, 101).

3. During the night of October 19th the "Drifter" was not guarded by a watchman, during which time the claimants were asleep on the "White City" (p. 88).

The Valentine, 131 Fed. 352;
Washington Tug & Barge Co. v. *Weyerhaeuser Timber*, 22 Fed. (2) 665.

4. Although Simpson testified that the "Drifter" was tied alongside Fisher's Dock and that bumpers were put out to prevent the boat banging or scratching against the

dock, it was not shown in what manner this boat was moored and particularly, if the "Drifter" was lighted during the night.

5. On the following morning the "White City" proceeded with her tow to Trans-Marine Dock without making any effort to telephone Consolidated Shipbuilding Corporation to obtain the services of Weston or some other laborer (p. 104).

Thus the "White City" was left without a lookout since Rhodes was operating the "White City" and Simpson was back on the "Drifter" (p. 104).

During the night of October 19th, while the "Drifter" was tied up at Fisher's Dock without any authority from the owner or its agent, and without any one to watch it during the night or to slacken its lines if necessary, it is possible that damage at that time occurred.

She might have been rammed by some other boat or if the lines were not slackened and the tide receded she might have been hanging on the side of the dock as the result whereof, a pile might have stove a hole in her side.

In *The Valentine*, 131 Fed. 352, the lighter was tied up to Pier 42, N. R., at a time when there was much ice in the river. During the night the bailee left no one in charge except a cook, deckhand and fireman, who were asleep. During the night the boat sank. The court said:

> "During the night the boat was practically deserted; she was substantially without a crew; *she had no watchman in any proper sense.* The equipment for pumping the water was valueless since it was inoperative. The negligence in the care of the cargo was gross."

In *Washington Tug & Barge Co.* v. *Weyerhaeuser Timber Co.*, 22 Fed. (2) 665 (C. C. A. 9) an action was brought by *Weyerhaeuser Lumber Co.*, the owner of a lumber

barge, W. T. No. 17, against *Brady & Katcham Lumber Company*, who in turn impleaded the *Washington Tug & Barge Co.*, who towed said barge, on the theory that it was primarily at fault. A decree was rendered against the Tug & Barge Company because of its negligence in leaving the barge unguarded by any watchman and leaving no lights exposed. The court said in affirming the judgment:

> "No watchman was left with the barge, and the court found that no lights were exposed. The Tugboat Company made no report either to the Williams Steamship Company or to Brady & Ketcham as to where it had moored the barge, or in what condition it left it. After so leaving it, it took no further concern in respect to it until about 12 o'clock, noon, next day, at which time on being requested to put it alongside the *Eagle* it learned that it was gone from the dock."

It was subsequently found damaged and the court continued:

> "How the barge escaped its moorings or was damaged is in a measure left to remote inference, if not speculation. If, however, the Tugboat Company was negligent in the respects found by the lower court upon evidence deemed to be sufficient, it is a fair conclusion that such negligence was the proximate cause of damage. 'I think' said the court, 'the Tug and Barge Company was negligent in leaving the scow at the Spokane Street dock without permission, and without a watchman in the absence of this permission, even though the place was the privileged place of the *S. S. Eagle.*'"

The court remarked that from the evidence, which was conflicting, the trial court might reasonably have drawn a

contrary conclusion since there was no direct evidence to support the findings that no lights were exposed. Nevertheless the court said:

> "While there was a want of direct and affirmative evidence to support the finding that no lights were exposed, we do not think the finding was unwarranted. Under the circumstances, the natural burden was on the Tugboat Company to show that it exercised reasonable care for the protection of the barge, and if it exposed lights knowledge of the fact was in its possession and not in the possession of either of the other parties. It not only refrained from making such proof, but on the other hand offered to show that it was under no obligation in the premises."

Although Simpson testified in answer to a leading question of his counsel that on the morning of October 20th he looked over the "Drifter" and found her to be "in perfect condition" and that he "could not see anything wrong anywheres," it was proven on cross examination that he never made any such inspection (pp. 89, 102).

On cross examination Simpson testified (p. 102):

> "Q. On the morning of October 20, what did you do? A. I was on the 'Drifter.' I went aboard the 'Drifter' to steer her like Captain Weston was doing before.
>
> "Q. You were on the 'Drifter'? A. I was on the 'Drifter,' yes.
>
> "Q. Did you do anything else? A. No, sir.
>
> "Q. You went to the 'Drifter'? A. Yes, sir.
>
> "Q. And steered her? A. Yes, sir.
>
> "Q. *And that is all you did from the time you got up that morning?* A. *Yes, sir.*"

Thus it appears beyond doubt that no inspection was made by Simpson on the morning of October 20th before

the "Drifter" left Fisher's Dock. It is, therefore, reasonable for the court to infer that the damage occurred during the night of October 19th when the "Drifter" was not guarded and probably unlighted. How could the appellant otherwise account for the damage when the trip from Fisher's Dock to destination was but five or six miles and the weather was fine and clear?

From the character of damage sustained to *The Drifter* the court might reasonably infer that the act which caused it was the result of negligence. In *The Kalkasha,* 107 Fed. 959 (C. C. A. 7), the court said, speaking through Judge Jenkins:

> "Although it may be said, the burden is upon the one alleging breach of contract of towage to show negligence or unskillfulness to his injury in the performance, still in some cases 'the result is a safe criterion about which to judge of the character of the act that caused it.' *The Webb,* 14 Wall. 406."

It is earnestly submitted that at all events there was affirmative proof of negligence on the part of the owners of the "White City" in the performance of towage, and surely there were facts established from which the court could reasonably infer that this damage was not caused by any act consistent with due care. The nature of the damage was "a safe criterion about which to judge of the character of the act that caused it." *The Webb,* 14 Wall. 406.

Much confusion now exists in Federal Courts and among maritime lawyers with respect to the true principle of law to be adopted in actions of this character. To secure uniformity of decision in the various Federal courts, and to remove the doubt that now exists in a subject matter of such great commercial importance, it is respectfully submitted that this court should review the decision of the Circuit Court of Appeals.

For these reasons petitioner's counsel respectfully submit that this court should issue its writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review this decision and settle the principle of law involved.

Respectfully submitted,

WILLIAM F. PURDY,
NEIL P. CULLOM,
JAMES E. FREEHILL,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931—No. 217.

WILLIAM STEVENS,

Petitioner,

against

The Vessel "WHITE CITY," her engines, tackle, apparel, etc.,

Respondent.

BRIEF IN BEHALF OF PETITIONER.

WILLIAM F. PURDY,
NEIL P. CULLOM,
JAMES E. FREEHILL,
Counsel for Petitioner.

CORPORATE PRESS, INC., New York City

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931—No. 217.

WILLIAM STEVENS,
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against
The Vessel "WHITE CITY," her engines, tackle, apparel, etc.,
Respondent.

BRIEF IN BEHALF OF PETITIONER.

Statement.

This case comes up on writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review a decree reversing a final decree in admiralty of the District Court for the Southern District of New York and dismissing the libel of the petitioner. The District Court's decree was entered in favor of the petitioner in an action commenced in admiralty against the vessel "White City" for damages sustained to a motor boat known as the "Drifter," which was damaged during towage.

The decree of the Circuit Court of Appeals was filed on April 13, 1931. Certiorari was granted October 19, 1931.

The opinion of Judge John M. Woolsey, delivered in the United States District Court, Southern District of New York in favor of petitioner, is reported in 35 F. (2nd) 1006 (R., 229 to 232), and the opinion delivered in the United States Circuit Court of Appeals for the Second Circuit in favor of respondent is reported in 48 F. (2nd) 557 (R., 303 to 308).

The jurisdiction of this court is invoked under Sec. 347(a) Title 28, of U. S. Code.

The Proceedings.

The action was commenced by the petitioner in admiralty, in the United States District Court for the Southern District of New York by filing a libel and complaint *in rem* against the vessel "White City" for damages sustained to a motor yacht, the "Drifter," owned by T. C. Frost assignor of petitioner, which was damaged during towage (R., 3, 4). A decision was rendered in favor of the petitioner after a trial in admiralty before District Judge John M. Woolsey and after assessment of damages before the special commissioner, a final decree was entered on April 14, 1930, in the sum of $1,410.35 (R., 243-245). Judge Woolsey found that the "Drifter" was delivered to the respondent in good condition at Morris Heights, New York City, on October 19, 1925, and was redelivered on October 20, 1925, at Port Newark in damaged condition, and held the respondent liable for the damages stating (R., 232):

> "The owners of the 'White City' became bailees of the 'Drifter' and her cradle on their delivery to the 'White City' at Morris Heights. *Doherty* v. *Pennsylvania Railroad Company,* 269 Fed. 959, 962, and cases there cited.
>
> "When as bailee a towing vessel receives her tow in good condition and delivers it damaged without being able to explain the damage, there is a presumption of negligence on her part and she must be held liable."

The respondent appealed to the Circuit Court of Appeals, which court reversed the decree rendered in the court below and dismissed the libel. The opinion of that court was written by Circuit Judge Learned Hand. The Circuit Court of Appeals based its reversal upon a question of law to wit that, although, as found by it, the motor boat

"Drifter" was delivered in good condition to the vessel "White City" and was redelivered in damaged condition, with no explanation of the circumstances under which it became damaged, there was no liability without definite proof of negligence. It stated that a tug is not a bailee for hire and that no presumption of negligence arises where a tug receives a tow in good condition and delivers it in damaged condition. It was recognized, however, that a presumption of negligence arises where the tow is under charter, even though its owner or agents be present during the towage and therefore acquainted with the cause of damage. The court stated that in principle it could not "distinguish between that and the situation at bar," because, "the reason for imposing a presumption appears to be here quite as strong as in demises; that is, the greater opportunity of the bailee to explain the injury, due to the immediacy of his access to the barge in the bailor's absence" (R., 303-308).

The court felt, however, that there decisions had "too strongly established an exception to justify a departure now," notwithstanding decisions to the contrary in other circuits.

The Facts.

On October 13, 1925, Ross, an employee of the Consolidated Shipbuilding Corporation, which built the motor boat "Drifter," had a telephone conversation with Alexander Simpson, father of Herbert Simpson and father-in-law of William A. Rhodes, owners of the vessel "White City," in which an arrangement was made for the towage of the motor boat "Drifter" by a boat called the "Hilda." This conversation was confirmed by a letter of said date which reads as follows (R., 36):

"October 13, 1925.

Mr. Alec Simpson,
151st St. & Hudson River,
New York City.

Dear Alec:

Confirming our telephone conversation of this day, and agreement, please have your work boat 'Hilda' here at our works on Monday morning, the 19th at 6 a. m. to tow 45' launch on cradle from Morris Heights to the Trans-Marine Steamship Company, alongside of steamer 'Suscolanco' at Port Newark, N. J. See Captain Lewis on arrival at pier. It is important that this boat arrive at the steamer before 3 P. M. that day.

Yours very truly,

CONSOLIDATED SHIPBUILDING CORPORATION,
W. A. ROOS, JR.,
Sales Dept."

WAR:T

Subsequent to the receipt of this letter and prior to October 19, 1925, Roos was advised that the "Hilda" was not available, but that another boat known as the "White City," owned by Simpson's son and son-in-law, would do the towing (R., 37). The substitution was agreed to prior to the morning of October 19th, 1925, and again Roos advised that the boat must be there at 6 a. m. on October 19th, 1925 (R., 36).

It was admitted that the "White City" did not arrive at 6 a. m. but came there at 8 a. m. Employees of the Consolidated Shipbuilding Corporation assisted in attaching the "Drifter" to the "White City" by a 40 foot rope and, by another rope, attached the cradle to the stern of the "Drifter." The boat was owned by T. C. Frost (R., 46).

The Consolidated Shipbuilding Corporation put one of its laborers (Weston) on the "White City" to tend to the lines when she would be alongside the steamer to which it was to be delivered by the "White City." Weston was not a licensed captain but merely a general handyman around the dock and did not operate the "Drifter" since it had no motor power (R., 40, 41, 46).

It was conceded that the "Drifter" was in good condition when it was received (R., 50, 56).

The "White City" with its tow, proceeded along the Harlem River and down the East River until it reached Hell Gate when the cradle to the stern of the "Drifter" became detached and a delay of fifteen to twenty minutes occurred, because it was necessary to again attach the cradle (R., 62, 63). No damage occurred to the "Drifter," at that time.

Thereafter the "White City" with its tow continued down the East River, across the bay, through Kill van Kull, into Newark Bay, where the "White City" sighted the s. s. "Suscalanco," on which boat the "Drifter" was to be shipped (R., 63).

Simpson testified that this was 5 p. m. but the answer fixes the time as 3:30 p. m. (R., 10, 63). The respondent, instead of proceeding direct to destination, proceeded to Fisher's Dock at Bayonne, N. J., although it was but a thirty minute trip to the Trans-Marine dock (R., 63, 64, 74). The "White City" and its tow were tied alongside of Fisher's Dock where it is stated by Simpson that big rubber tires or fenders were put out to keep the "Drifter" from banging or scratching against the dock. It was not shown which side was nearest Fisher's Dock, nor how the boat was moored or whether lights were put on the boat during the night. *During the night it was not guarded by any watchman.*

Simpson testified that at Fisher's Dock his partner Rhodes telephoned the Consolidated Shipbuilding Corporation and was unable to speak to anyone in authority except a watchman who had told him "to bring the boat

back" (R., 63, 64). Simpson also stated that Rhodes thereupon telephoned Alexander Simpson, who he claims told him that the "Drifter" was to go on another steamer because the orders were changed and that he "should take the boat to Port Newark, that next day, or as soon as we could get there" (R., 64). No proof of any change of orders was ever made by respondent.

Alexander Simpson testified that he could not remember any such conversation with his son-in-law, Rhodes (R., 266). Rhodes was then asked by Weston if he could not go home that night, to which he replied (R., 273):

> "I didn't see any reason why he should stay. As far as I was concerned, I didn't see any reason either why he should stay. It wasn't my business to know any reason."

When asked if he told Weston to go home he stated, "I told him he could go home" (R., 289).

It is conceded that on the morning of October 20th, 1925, when the tug with its tow proceeded to destination, that no request was made by respondent to the Consolidated Shipbuilding Company for Weston or any other laborer (R., 77).

During the night of October 19, 1925, while the "White City" and its tow was moored to Fisher's Dock, the respondents slept on the "White City" leaving no one to watch the "Drifter" (R., 64, 74). No account is given of what happened on the night of October 19, 1925, while the "Drifter" was at Fisher's Dock.

Although Simpson stated that on the morning of October 20th he looked over the "White City" and the "Drifter," and that they were in perfect condition, because he "could not see anything wrong anywheres" it is obvious that he made no inspection because on cross examination he was asked particularly what he did that morning, and he stated that he went aboard the "Drifter" to steer her, and that

he did not do anything else from the time he got up that morning until he went on the "Drifter" (R., 64, 75).

The "White City" with its tow arrived on the morning of October 20th, 1925 at Trans-Marine Pier, at Port Newark, New Jersey, at about 7:30 to 8:00 a. m. The weather was clear and the sun was shining (R., 51).

Although the respondent denied in its answer and vigorously contended on the trial that the "Drifter" was not damaged in its possession, the trial judge stated that he believed the petitioner's witnesses who said that the "Drifter" was damaged when it arrived, which was corroborated by the damage receipt taken by the owners of the "White City" without protest (R., 232). The damage receipt was marked in evidence (R., 225).

This finding was approved by the Circuit Court of Appeals, which stated (R., 304):

> "We see no reason to question the conclusion that the hole was made during the trip, and we dispose of the case upon that assumption."

Bauer, who saw the "Drifter" coming toward the dock, stated that he saw "a hole stove in her, midship, right above waterline" and that upon examination "there were five planks gone in her" (R., 50, 51).

The trial judge found "that neither Rhodes nor Simpson (owner of the tug) could explain what, how or where the damage happened," which finding was expressly approved by the Circuit Court of Appeals (R., 232).

With respect to the claim made by the owners of the "White City" that the damage was caused by driftwood, Judge Learned Hand said (R., 304):

> "They suggested that a piece of driftwood, of which there was much in the bay at that season, might have stove in the yacht's side, but this was merely an assumption."

The testimony of the respondent was characterized in the opinion of the Circuit Court of Appeals as "too scanty to meet" the test of explaining how the injury occurred or else that it was not caused by neglect.

POINT I.

A tug performing a simple towage contract is a bailee for hire, particularly where the tow is manned only by a servant or bargee, who is not present during the period when the damage to the tow takes place.

It is well settled that the duty of a tug in performing a simple towage contract is to provide the motive power and to direct the course of the tow. Its obligation is to exercise reasonable and ordinary care which is the same obligation of a bailee for hire.

In *Maryland Transportation Co.* v. *Dempsey,* C. C. A. (4), 279 Fed. 94, Waddill, C. J., said:

> "The duty owed by a tug to its tow is well settled, and while a tug is not the insurer of its tow, nor are the duties of a common carrier imposed upon it, it is nevertheless charged with the exercise of reasonable and ordinary care, caution, and maritime skill in and about the service undertaken, and for omissions in this respect, liability follows. *The Margaret,* 94 U. S. 494-497, 24 L. Ed. 146; *The Britannia* (D. C.), 148 Fed. 495-497."

The duties of a tug have been similarly defined by this court. *The Margaret,* 94 U. S. 494; *The Dayton,* 120 U. S. 337.

In *The Margaret, supra,* Mr. Justice Swayne said (p. 497):

> "She (the tug) was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in everything relating to the work until it was accomplished."

In *The Dayton, supra,* Mr. Justice Matthews said:

> "As between the tow and its tug, *The Dayton,* the contract of towage involves a responsibility for loss upon the tug only by reason of the want of ordinary care; for a tug is not a common carrier and does not insure the safety of its tow."

This court has defined the obligation of a bailee for hire as being similar to that of a tug performing a simple contract of towage.

In *Clark* v. *United States,* 95 U. S. 539, Mr. Justice Bradley said:

> "A bailee for hire is only responsible for ordinary diligence and liable for ordinary negligence in the care of the property bailed. This is not only the common law, but the general law on the subject. See *Jones, Bailment,* p. 88; *Story, Bailment,* §§398, 399; *Domat, Lois Civilis,* Lib. 1, tit. 4, §3, pars. 3, 4; 1 Bell, Com., pp. 481, 483, 7th ed."

The foregoing statement was reiterated by this court in *Sun Printing Association* v. *Moore,* 183 U. S. 642.

In 6 Corpus Juris, under title *Bailments,* at §1, it is stated:

> "A bailment may be defined as a delivery of personalty for some particular purpose, or on mere deposit upon a contract, express or implied, that after the purpose has been fulfilled, it should be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he claims it is as the case may be."

Any kind of personal property may be the subject of a bailment. In 6 Corpus Juris, title *Bailments*, at §23, it is stated:

> "*Sufficiency of.* Such a full delivery of the subject matter must be made to the bailee as will entitle him to exclude for the time of the bailment the possession of the owner, as will make him liable as its sole custodian to the latter in the event of his neglect or fault in discharging his trust with respect to the subject matter and as to require a redelivery of it by him to the owner or other person entitled to receive it after the trust of the bailment has been discharged."

District Judge Woolsey, an eminent admiralty authority, held that under the facts of this case, the "White City" was a bailee for hire, stating (R., 232):

> "The owners of the 'White City' became bailees of the 'Drifter' and her cradle on their delivery to the 'White City' at Morris Heights. *Doherty* v. *Pennsylvania Railroad Co.*, 269 Fed. 959, 962, and cases there cited."

The Circuit Court of Appeals, however, arrived at an entirely different conclusion, stating (R., 305):

> "There is no doubt that a towage contract, *simpliciter*, does not put the tow in bail to the tug (*The Webb*, 14 Wall. 405, 20 L. Ed. 774; *Eastern Transportation Line* v. *Hope*, 95 U. S. 297, 24 L. Ed. 477), but when the tow has no one in charge it has repeatedly been said, though generally *obiter*, that a bailment results (citing cases.)"

No one representing the owner of the "Drifter" was present at the time the damage was occasioned and therefore the petitioner could not adduce evidence by eye-witnesses as to the cause of the damage. Weston, a laborer, who was on board the "Drifter" as a general handyman, left the boat at Fisher's Dock, Bayonne, New Jersey, with the express permission of Rhoades, one of the owners of

the "White City," and up to that time no damage to the boat had been occasioned or reported (R., 273, 289).

The Circuit Court of Appeals, in holding the "White City" was not a bailee departed from its previous decision on the subject, wherein it was expressly held that a tug, although not a common carrier, is a bailee for hire.

In *McWilliams Bros., Inc.* v. *Director General,* C. C. A. (2nd), 271 Fed. 931, 932, Circuit Judge Rogers, writing for the court, said:

> "The highest degree of skill is not required, for she (the tug) is not a common carrier; neither is she an insurer; she is merely a bailee for hire."

In *Hughes* on *Admiralty,* 2nd Ed., it is stated (p. 129):

> "There are some early decisions to the effect that a tug boat is a common carrier but the later authorities have settled thoroughly that it is not, *but only an ordinary bailee liable for ordinary negligence.*"

In 38 Cyc. entitled "Towage" (p. 563), it is stated:

> "* * * The owners of a tug are merely *bailees for hire* and as such are bound to exercise skill, care and diligence in everything relating to the work until it is accomplished."

In *Brinton and Drifting Barges,* 48 Fed. (2) 559, the Circuit Court of Appeals for the Second Circuit held that the Pennsylvania Railroad was a bailee where it maintained a mooring rack at South Amboy, for the delivery of barges to be loaded with coal. The court said:

> "As to the barges themselves there was, however, such a duty. The road was a bailee. (Citing cases.) The relation is analogous to that of a tug which temporarily moors a barge en route, or at the end of the voyage, *Bouchard* v. *Pa. R. R. Co.,* 1925 A. M. C. 486, 6 Fed. (2) 362 (2 C. C. A.); *McWilliams* v. *Davis,* 1923 A. M. C. 29, 285 Fed. 312 (2 C. C. A.); *Howard,* 252 Fed. 85 (2 C. C. A.)."

In the case at bar, the "Drifter" was temporarily moored at Fisher's Dock, Bayonne, New Jersey, by the respondent and up to that time no damage had been reported. It would thus appear that the respondent was surely a bailee at that point.

In the case of *State of Washington ex rel. Stimson Lumber Co.* v. *Koydendall,* 275 U. S. 207, a tug boat was engaged in the tow boat business, chiefly the towing of logs. It held itself out as a common carrier thereof and became so by its own choice. The distinction between a common carrier and a private carrier is made clear. Although it is not claimed by the petitioner that the respondent was a common carrier in the towage of the "Drifter," it is contended that it was a private carrier, and therefore a bailee for hire.

The respondent in the court below urged that during the towage, the "Drifter" was in charge of Weston, a colored laborer, who was employed by the Consolidated Shipbuilding Corporation, which built the boat "Drifter," but the record clearly shows that he had nothing to do with the operation of the "Drifter" since it had no motive power (R., 40, 41-46).

Roos, who arranged for the towage, testified that Weston was a laborer employed as a general handyman around the tug and that he did not have charge of the "Drifter." His testimony on this point reads as follows (R., 40):

> "Q. Why was he (Weston) placed there (on the 'Drifter')? A. Because it is the usual custom to have a man go alongside of the steamer to take a line on the dock, and see that the boat is fended off the dock.
>
> "Q. And to take care of the boat while it is being conveyed? A. He has nothing to do with that."

There is no question but that the "Drifter" was in the possession and under the custody of the tug "White City"

during the towage, and particularly between the time the tug arrived at Fisher's Dock and the time when it was delivered at destination, because during this latter period Weston was not on board, having left the "Drifter" when she arrived at Fisher's Dock with the express consent of the owners of the tug "White City." This statement is supported even in the opinion of the Circuit Court of Appeals, wherein it stated (R., 304):

> "She took the yacht and cradle upon a hawser and started out, there being no one on the tow except a servant of the builder, whose duties were no different from those of the ordinary bargee, and whom we shall consider as such. * * * The bargee (after the 'Drifter' arrived at Fisher's Dock) not wishing to stay aboard, announced that he would leave, to which the master of the 'White City' did not object, and he left."

The master of the "White City" testified that Weston asked permission to go home, to which he consented (R., 273).

The testimony of Rhodes, the master, on this point is as follows (R., 289):

> "Q. You sent Fred Weston home, didn't you, when you got to Fisher's Dock? A. I didn't send him home, no.
>
> "Q. You told him to go home? A. I told him he could go home."

It is apparent that Judge Hand misinterpreted the language of this court in the steamer *"Webb,"* 14 Wall. 406 (1871). Nowhere in that decision did the court state that a tug was not a bailee for hire. The court said, speaking through Mr. Justice Strong:

> "It must be conceded that an engagement to tow does not impose either an obligation to insure or the liability of common carriers."

This is far different from holding that a tug is not a bailee for hire or that an engagement to tow is not a bailment.

In *Transportation Line* v. *Hope* (1877), 95 U. S. 297, also relied upon, this court particularly pointed out that the tug did not have exclusive control of the tow, nor exercise any dominion over the protection of the tow and its cargo. The appeal presented the question as to whether or not it was proper for the tug to ask the trial judge to charge the jury that the barge or tow was within the exclusive possession and exclusive care and control of her owner. This the trial judge refused to charge, which was held by this court to be no error. The trial judge stated the law as follows:

> "By the contract between the parties, the defendants undertook to tow the plaintiff's barge from Jersey City to New Haven. As a necessary incident of this engagement, the defendants were entitled and were bound to assume supreme control and direction of the plaintiff's boat, and of the persons in charge of her, so far as necessary to enable them to fulfill their engagement, and were bound to exercise such degree of diligence and care as a prudent and skilful performance of the service for which they stipulated would require."

This court stated that this properly defined the position of the parties, stating (p. 299):

> "The answer of the court properly defined the position of the parties."

While it is true that this court did state that it might have been well for the tug to request a charge, "that the transporter of the boat was not a bailee, and perhaps that the boat was not within his exclusive control," this state-

ment was made with reference to the circumstances of that particular case.

It is to be noted that the court cited as authority *Alexander* v. *Greene,* 3 Hill (New York) 9, wherein the obligation of a tug was defined and its character and its responsibility mentioned as that of an ordinary bailee for hire. Judge Bronson said:

> "The defendants carry on the business of towing boats laden with merchandise and produce, and are undoubtedly willing to engage for all persons who may desire their services. But I think they are not common carriers. They do not receive the property into their custody, nor do they exercise any control over it other than such as results from the towing of the boats in which it is laden. They neither employ the master and hands of the boats towed, nor do they exercise any authority over them beyond that of occasionally requiring their aid in governing the flotilla. The goods or other property remain in the care and charge of the master and hands of the boat towed."
>
> * * * * * * * *
>
> "If the defendants are not common carriers, then, aside from any express contract, they would be holden to the same rule of responsibility as *ordinary bailees for hire.*"

In the case at bar, however, the tow carried no cargo but was merely a pleasure boat. It was in exclusive possession and under the control of the tug. During the night of October 19, 1925, no representative of the owner of the "Drifter" was present. It was moored to the dock by the owners of the "White City" whose duty it was to protect it from damage.

Since a tug is not a common carrier or insurer, what else could it be, other than a bailee for hire? The "White City" made a contract to receive the "Drifter" at the Con-

solidated Shipbuilding Corporation yard and to deliver it alongside the S. S. "Suscalanco" at Trans-Marine Dock at Port Newark, New Jersey. The contract provided for no exception of any character, nor did it limit the obligation of the tug to safely deliver the "Drifter" (R., 36).

In *The Princeton,* 19 Fed. Cas. 11433 at page 1342, the court said:

> "I think the owners of a towing vessel have not imposed on them by law any higher obligation than that of bailee for hire * * *."

In *Bust* v. *Cornell,* 24 Fed. 188, a tug was towing a canal and pile driver, which became loose because of defective cleats. The pile driver had no crew. Whether or not the canal boat had a crew, did not appear in the opinion. The court, in describing the obligation of the tug, stated:

> "They were bailees for hire, having life and property in their keeping."

In the *D. Newcomb,* 16 Fed. 274 (W. D. Penn.), it was necessary to define the obligation of a tug performing a simple towage contract. The court stated:

> "They were bailees for hire."

In *Sturgis* v. *Moyer,* 65 U. S., 23, this court stated that a tug performing a stowage contract has exclusive control, direction and management of its tow, even when the tow has on board a mate or stevedore at its wheel.

In *The Delaware,* 43 Fed. (2) 852, District Judge Kirkpatrick stated:

> "It has been held that the owner of a tug to whom a vessel has been delivered under an ordinary contract of towage is a bailee for hire."

In the foregoing case, the court expressly approved the decision of District Judge Woolsey in this case stating that his opinion represented a correct statement of the law.

In the *Genesee*, 139 Fed. 549, C. C. A. (2) a contract of towage was stated to be a contract of bailment and that the obligation of the tug was that of a bailee for hire.

In *The Seven Sons* (District Court, W. D. Pa.), 29 Fed. 543, the court stated:

> "Now, here, the owners of the tug boat were bailees for hire of the flat boat."

In *Newport News Shipbuilding and Dry Dock* (C. C. A. 4 [2]) 34 Fed. (2) 100, the court said:

> "The loss was due to fire which broke out upon a vessel delivered to the bailee for repairs, in a part of the vessel where only employees of the bailee were present."

It seems quite clear by the overwhelming weight of modern authority that a tug which takes possession of a tow under a contract of towage is a bailee for hire, particularly where during a part of the towage, no one representing the owner of the tow is present when damage occurs. In the case at bar, there is no question that from the time the "Drifter" arrived at Fisher's Dock and stayed over night, and the time of arrival at destination, no representative of the owner of the "Drifter" was present, and therefore, it was impossible for anyone other than the owners of the tug to know the circumstances under which the "Drifter" became damaged. Can the owners of the tug be heard to say that they did not have exclusive possession and control of the "Drifter" after she arrived at Fisher's Dock, at which time Weston, the laborer, was permitted to go home?

POINT II.

Where a bailee for hire receives property in good condition and delivers the same in a damaged state, a prima facie case of negligence is made, which casts upon the bailee the burden of showing the circumstances surrounding the damage.

If the obligation of the "White City" is that of a bailee for hire, there can be no question but that the principle above stated is a correct statement of the law.

In *Southern Railway* v. *Prescott*, 240 U. S. 632, 640,, the facts were that merchandise in the hands of a warehouseman, and therefore a bailee, was lost in a fire, which fact was shown and also the circumstances of the fire were such as not to raise an inference of lack of reasonable care on the part of the bailee. The court stated (p. 640) :

> "As it is the duty of the warehouseman to deliver upon proper demand, his failure to do without excuse, has been regarded as making a *prima facie* case of negligence."

In *6 Corpus Juris*, page 1158, Title *"Bailments,"* the distinction between the ancient and modern rule with respect to a presumption of negligence is recognized where it is said:

> *"Older Rule*
>
> "In some of the old decisions it was held that the loss or injury raised no presumption of negligence.
> * * *
>
> *"Modern Rule*
>
> "The rule adopted in the more modern decisions is that the proof of loss or injury establishes a sufficient *prima facie* case against the bailee to put him upon his defense. Where chattels are delivered to a bailee

in good condition and are returned in a damaged state, or are lost or not returned at all, the law presumes negligence to be the cause and casts upon the bailee the burden of showing that the loss is due to other causes consistent with due care on his part."

The foregoing rule was recently announced by the Circuit Court of Appeals in *Cummings* v. *Pennsylvania Railroad,* 45 Fed. (2) 152, 153 as follows:

"The law on the subject was later correctly stated in the charge as follows:

"'If the jury find from a preponderance of all of the evidence that plaintiff's barge was in tight, staunch, strong and seaworthy condition when delivered under charter to the Pennsylvania Railroad Company, and was damaged when returned to plaintiff, your verdict must be for the plaintiff, unless defendant shows either how the damage occurred, and, second, that none of defendant's acts caused or contributed to that damage, or, first, everything it did with respect to the plaintiff's barge during the charter period, and, second, that none of its acts were negligent, as I have defined negligence in this charge.'"

The justice of the rule is very apparent because the bailor is usually ignorant in most cases, of the circumstances surrounding the damage to his property when it is in the possession of the bailee.

The Circuit Court of Appeals in refusing to adopt this principle of law in the case at bar, however, recognized its merits because it stated:

"If free to choose we should follow the decision below."

The court, notwithstanding this, felt constrained to follow its own decisions on what we submit was an erroneous assumption that those decisions unqualifiedly held that a tug was not a bailee for hire.

The cases involving damage to barges under charter manned by a master and crew, where the principle has been applied, were reviewed.

The court said:

> "In the case of charters which are demises, we have often held that redelivery in damaged condition raises a presumption of negligence which the demisee must explain. * * * *In principle we cannot distinguish between that and the situation at bar* and if free to choose we should follow the decision below. *The reason for imposing a presumption appears to be quite as strong as in demises;* that is, the greater opportunity of the bailee to explain the injury, due to the immediacy of his access to the barge and the bailor's absence. Though a distinction might have been drawn when a bargee is present, none ever has been, and the only ground we can imagine is that in a demise the period of custody is usually longer, not a satisfactory difference.
>
> "Our own decisions seem to us, however, to have too strongly established an exception to justify a departure now. Whether this has arisen from confusing an ordinary towage contract where the owner or the tow remains in possession with a contract like this where the tow is unmanned, or manned only by a bargee, we cannot tell. Probably the doctrine generally applicable was carried over to this situation without observing the difference; so far as appears, the anomaly has not hitherto been observed."

We respectfully submit that in principle there is no distinction between damage to a barge under charter where

the bargee is present and the situation presented in the case at bar, particularly where the cause of damage is unknown to the owner of the tow, and when it occurred while none of his representatives were present. If redelivery of the barge in a damaged condition in the former situation, raises a presumption of negligence, then surely, a similar presumption should be indulged in here.

If the modern rule adopted in recent decisions is followed, this unjust and inequitable distinction can be removed. It is a harsh rule which obligates the owners of a boat such as the "Drifter," to specifically point out overt acts of negligence on the part of a tug boat which undertakes a contract of towage where the circumstances of damage are not explained, and which are unknown to the owner.

If the "Drifter," instead of being damaged, was lost because of some unexplained reason which occurred during the night when it was tied up at Fisher's Dock and while the owners of the "White City" were asleep on their boat, the petitioner would be powerless to establish affirmatively any negligence on the part of the "White City" resulting in its loss. It would naturally be against the interest of the bailee to reveal the circumstances of the loss if inconsistent with ordinary care and diligence.

In the case at bar, the failure to impose a presumption of negligence where the circumstances surrounding an injury are not explained, amounts, we submit, with great respect, to a denial of justice, particularly where, as here, the owner of the "Drifter" had no representative present at the time of the damage. The owners of the tug boat and its employees by professing ignorance when they might otherwise have full knowledge of the cause of the damage, can defeat a just claim and this places a premium upon concealment and suppression of evidence.

Modern conditions in the towage of boats in the harbor of New York are vastly different from those which obtained in 1870 at the time of the rendition of the decision of the United States Supreme Court in *The "Webb,"* 14 Wall. 406.

In *The "Webb,"* 14 Wall. 406, the manner in which the tow was damaged was shown and its owner had representatives on board. Since the tug departed from the true course of the voyage, the court stated that it "was enough to devolve upon the tug the duty of explanation."

The court did not say that a presumption of negligence could never arise in a case where a tug received its tow in good condition and delivered it in damaged condition. It merely stated that *ordinarily,* such a presumption did not exist. No doubt the court had in mind a situation of this character where under the circumstances, it would be just and equitable to hold that a prima facie case of negligence was made out upon proof that a tug received its tow in good condition and delivered it in damaged condition, without explanation of the circumstances under which the tow became damaged. This appears from the opinion of Judge Strong, wherein it is stated:

> "Unlike the case of common carriers, damage sustained by the tow *does not ordinarily* raise a presumption that the tug has been at fault * * * but there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it."

The foregoing statement has unfortunately been taken to be an unequivocal statement that under no possible circumstances would a presumption of negligence ever be drawn against a tug. Many courts have differed on the interpretation of this statement and unless it is clarified, confusion and uncertainty will continue to exist.

At the time the *"Webb"* case was decided it was held in certain New York decisions, such as *Wells* v. *Navigation,* 2 N. Y. 204, that a tug boat was not a common carrier and by way of dictum it was stated it was not a bailee for hire, while in *Alexander* v. *Greene,* 3 Hill (New York) 9, it was held that a tug boat "would be holden to the same rule of responsibility as ordinary bailees for hire." This latter

decision was cited by this court in *Transportation Line* v. *Hope,* 95 U. S. 299, in support of a statement that a tug boat "was not bound to the extraordinary duties and liabilities of a common carrier," and that it did not exercise that internal control of cargo or storage on a barge which ordinarily "belonged to a bailee."

While it is true that very early decisions of the Court of Appeals of the State of New York refused to recognize that a presumption of negligence could ever be drawn against a bailee, it is clear from later decisions that the rule announced in such cases has now been entirely changed by that court.

In *Wintringham* v. *Hayes,* 144 N. Y. 5, a yacht was delivered to plaintiff in good condition and returned in damaged condition. Judge Bartlett speaking for the Court of Appeals, said:

> "In the case at bar if the defendant, in support of his first counterclaim is able to prove the condition of the yacht when delivered to the plaintiff, the nature of the subsequent injuries she sustained, and that they were not the results of ordinary wear and tear, he will have made out a *prima facie* case and the burden of proof will be shifted to the plaintiff, who as bailee, had the yacht exclusively within his control and should be able to show the manner in which he discharged his contract obligations in the premises."

The reason for the departure from the ancient rule embodied in earlier decisions, is because of the demands of modern progress in transportation. This is made clear by later decisions of that court.

In *Strauss* v. *Canadian Pacific Railway Co.,* 254 N. Y. 407, the court had occasion to discuss early decisions of that court which stated that a contract for the carriage of goods was purely private, in which the public had no concern, and therefore, the carrier could provide in its contract for exemption from negligence.

In departing from those decisions the court said (p. 412):

> "While the early decisions in this state expressed the public policy of the state at the time, changed conditions have resulted in a change of the public policy of the state.
>
> "The rule of freedom of contract which reflected the public policy of the state in the days of the canal boat and stage coach have ceased to be applicable under modern conditions."

The forceful language used by Judge Crane as to the function of the law stated in *Oppenheim* v. *Kridel,* 236 N. Y. 156, is very appropriate.

The question at issue was whether or not a wife could maintain an action for criminal conversation against her husband's paramour. The defendant urged that such an action could not be maintained because of an ancient rule of law embodied in early decisions. Those early decisions, however, recognized the right of a husband to bring such an action. The court in departing from that ancient rule said, speaking through Judge Crane (p. 165):

> "In fact, there has been no objection raised anywhere to the right of the wife to maintain the action for criminal conversation except the plea that the ancient law did not give it to her. Reverence for antiquity demands no such denial. Courts exist for the purpose of ameliorating the harshness of ancient laws inconsistent with modern progress, when it can be done without interfering with vested rights."

And at page 164:

> "What is here said about 'natural right' and the 'flexibility of the common law' is equally applicable to an action for criminal conversation. If the husband has such an action, why should not the wife?

> The reasons for giving the action to the one are as potent for giving the action to the other, as I have above demonstrated. The common law is not rigid and inflexible, a thing dead to all surrounding and changing conditions. It does expand with reason. The common law is not a compendium of mechanical rules written in fixed and indelible characters but a living organism which grows and moves in response to the larger and fuller development of the nation."

In *Hertz* v. *Woodman,* 218 U. S. 205-12, the Supreme Court said:

> "The Circuit Court of Appeals was obviously not bound to follow its own prior decision. The rule of *stare decisis* though one tending to consistency and uniformity of decision is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court which is again called upon to consider a question once decided."

In *People* v. *Nixon,* 248 N. Y. 182, the Court of Appeals of the State of New York overruled a former decision, decided only five years prior thereto, and Judge Lehman said at page 192:

> "It is right that this court should hesitate to overrule a previous decision, but when, convinced that an artificial rule of practice created by it, is erroneous and hampers the administration of justice, it is its duty to refuse to perpetuate previous error."

Chief Judge Cardozo in his book "The Nature of the Judicial Process" has well stated the modern view on this point (pp. 98, 156):

> "Few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end.

> "I have drawn illustrations from the field of substantive law. The law of evidence and generally the whole subject of procedure supply fields where change may properly be made with a freedom even greater. The considerations of policy that dictate adherence to existing rules where substantive rights are involved, apply with diminished force when it is a question of the law of remedies."

Decisions of other federal courts outside the Second Circuit clearly indicate that a prima facie case of negligence is made out where a tug received a tow in good condition and delivered the same in damaged condition, where the cause of damage or the circumstances thereof are not shown.

See *Great Lakes Towing Co.* v. *Alve,* C. C. A. 7, 261 Fed. 261; *Susquehanna* v. *East.* (D. C. Mass.), 200 Fed. 317; *Burr* v. *Knickerbocker* (C. C. A. 1st), 132 Fed. 248; *Gilchrist* v. *Great Lakes Towing Co.* (E. D. N. J.), 237 Fed. 432; *Vessel Owners Towing* v. *Wilsa* (C. C. A. 7), 63 Fed. 626; *The "Delaware,"* 43 Fed. (2d) 852; *Pederson* v. *John D. Spreckles & Bros. Co.,* 87 Fed. 938; *The Seven Sons* (W. D. Penn.), 29 Fed. 543.

In *Burr* v. *Knickerbocker* (C. C. A. 1st), 132 Fed. 248, it was held:

> "In order to prove negligence, it is not invariably necessary for the libellant to show the specific details of negligence, or account for the exact manner in which the injury is inflicted. When the libellant proved that the moving of the vessel was in sole charge of the tug, that the schooner's wheel was hard aport, and that on a summer afternoon, with a light breeze and moderate tide, and with nothing to prevent the tug from having such full control of the schooner as would keep her in deep water, she was so towed that she came upon the westerly shore, or upon

a well-known rock, before she had gone more than three or four lengths, *prima facie* case of negligence was established."

In *Susquehanna* v. *East.* (D. C. Mass.), 200 Fed. 317, District Judge Dodd said:

"Under such circumstances the fact that the Devon (barge) grounded, raises a presumption that the tug was negligent. * * * The burden is on the tug to explain the cause of the disaster."

In *Gilchrist Transportation Co.* v. *Great Lakes Towing Co.* (E. D. N. Y.), 237 Fed. 432, District Judge Haight said:

"* * * The mere happening of an accident may, under such circumstances, raise a presumption of negligence, and cast upon the tug the burden of demonstrating that it was not due to any failure of duty on her part, such as that the action was one of those inevitable occurrences for which no one is to blame. * * *"

In *The "Mason,"* 249 Fed. 718, District Judge Hough said:

"* * * In good weather and harbor waters, a tug in broad daylight put aground a vessel having at the time no motive power of her own, and completely under the control of the tugs. When these facts were shown claimant gave no evidence. If negligence is not inferable from such circumstances, it is difficult to imagine anything that could justify the conclusion short of proven intent to injure another's property."

In the case at bar, the "Drifter" was delivered on a fine clear day with a hole stove in its side at midship

near the water line and no explanation was offered by the respondent. Under such circumstances, surely an inference of negligence should have been drawn.

In *Vessel Owners Towing* v. *Wilsa* (C. C. A. 7), 63 Fed. 626, a tug permitted a vessel in tow to strike an abutment extending below the level of the water and which had been there for twenty-five years. The court said (p. 63):

> "The collision occurred in broad daylight, and under such circumstances, the fact of the collision creates a presumption of negligence on the part of the tug."

In *The "Delaware"* (E. D. Penn.), 43 Fed. (2) 852, the court held that a prima facie case of negligence was made out by proof that the tow was delivered in good condition and was redelivered in damaged condition, which obligated the tug to go forward with evidence showing circumstances under which the loss of damage occurred. District Judge Kirkpatrick said:

> "Whether this view need be adopted or whether the bailment arising under such contract is *sui generis*, the law in the Federal Courts, as to the responsibility of the tug owner for loss or damage to the tow and as to the burden of proof in causes arising from such loss or damage, is well settled. The measure of the tug owners duty to the tow is ordinary care and diligency. He is not a common carrier, nor an insurer, but is liable only for loss occasioned by his negligence. In a case of loss or damage, the libellant has a *prima facie* case if he shows that such loss or damage occurred while the subject of the bailment was in the exclusive custody and control of the bailee. This showing, however, merely imposes upon the bailee the duty of going forward with the evidence. It does not, properly speaking, constitute evidence of negligence.

When the bailee accepts this duty and shows how the loss occurred, the force and effect of the *prima facie* case disappears. Then, unless it affirmatively appears from the evidence so produced, that the loss was caused by negligence of the bailee, the burden reverts to the libellant (or, perhaps more properly, the burden originally upon him is revived) and it becomes encumbent upon him to produce evidence of negligence on the part of the bailee; otherwise his case fails. The result will be the same, if as in the instant case, the libellant does not choose to rest his case upon proof of delivery and failure to return, but elects to adduce evidence showing the circumstances under which the loss occurred.

"As has been seen, if the tow is in the exclusive possession and control of the tug, it does place upon the tug the duty of going forward with the evidence and showing the circumstances under which the loss or damage occurred."

In the foregoing case the court held that while the tug need not show exactly what caused the damage, it must by evidence show the circumstances thereof. This is a rule that proceeds from reason. If no such obligation was placed on the tug, its owner and employees might otherwise defeat a just claim by silence and concealment particularly, where the bailor has no evidence of the circumstances under which its boat became damaged.

POINT III.

Even assuming the correctness of the decision of the Circuit Court of Appeals on the foregoing questions of law, the reversal was erroneous because there was ample proof of negligence on the part of the owners of the "White City" as well as facts from which the court could reasonably infer that the damage was caused by a negligent act.

Even if a presumption of negligence did not arise from the receipt of the tow in good condition and its delivery in damaged condition, the "White City" was clearly guilty of negligence in the following respects:

1. Although the "White City" agreed to be at the Consolidated Shipbuilding Corporation on October 19th at 6 a. m., it did not arrive according to claimant's admission until 8 a. m. (R., 36, 60).

Connolly v. *Wilkes,* 23 Barb. (N. Y.) 539.

2. Respondent arrived at Fisher's Dock at 3:30 p. m. on October 19th and without authority tied up at said place overnight without proceeding direct to destination, which was but a thirty-minute trip (R., 63, 64, 74, 75).

3. During the night of October 19th the "Drifter" was not guarded by a watchman, during which time the owners of the "White City" were asleep on the "White City" (R., 74).

The Valentine, 131 Fed. 352;
Washington Tug & Barge Co. v. *Weyerhaeuser Timber,* 22 Fed. (2) 665.

4. Although Simpson testified that the "Drifter" was tied alongside Fishers' Dock and that bumpers were put

out to prevent the boat banging or scratching against the dock, it was not shown in what manner this boat was moored and particularly, if the "Drifter" was lighted during the night.

5. On the following morning the "White City" proceeded with her tow to Trans-Marine Dock without making any effort to telephone Consolidated Shipbuilding Corporation to obtain the services of Weston or some other laborer (R., 77).

Thus the "White City" was left without a lookout since Rhodes was operating the "White City" and Simpson was back on the "Drifter" (R. 77).

During the night of October 19th, while the "Drifter" was tied up at Fisher's Dock without any authority from the owner or its agent, and without any one to watch it during the night or to slacken its lines if necessary, it is possible that damage at that time occurred.

She might have been rammed by some other boat or if the lines were not slackened and the tide receded she might have been hanging on the side of the dock as the result whereof, a pile might have stove a hole in her side.

In *The Valentine,* 131 Fed. 352, the lighter was tied up to Pier 42, N. R., at a time when there was much ice in the river. During the night the bailee left no one in charge except a cook, deckhand and fireman, who were asleep. During the night the boat sank. The court said:

> "During the night the boat was practically deserted; she was substantially without a crew; *she had no watchman in any proper sense.* The equipment for pumping the water was valueless since it was inoperative. The negligence in the care of the cargo was gross."

In *Washington Tug & Barge Co.* v. *Weyerhaeuser Timber Co.,* 22 Fed. (2) 665 (C. C. A. 9) an action was brought

by *Weyerhaeuser Lumber Co.*, the owner of a lumber barge, W. T. No. 17, against *Brady & Katcham Lumber Company*, who in turn impleaded the *Washington Tug & Barge Co.*, who towed said barge, on the theory that it was primarily at fault. A decree was rendered against the Tug & Barge Company because of its negligence in leaving the barge unguarded by any watchman and leaving no lights exposed. The court said in affirming the judgment:

> "No watchman was left with the barge, and the court found that no lights were exposed. The Tugboat Company made no report either to the Williams Steamship Company or to Brady & Ketcham as to where it had moored the barge, or in what condition it left it. After so leaving it, it took no further concern in respect to it until about 12 o'clock, noon, next day, at which time on being requested to put it alongside of the *Eagle* it learned that it was gone from the dock."

It was subsequently found damaged and the court continued:

> "How the barge escaped its moorings or was damaged is in a measure left to remote inference, if not speculation. If, however, the Tugboat Company was negligent in the respects found by the lower court upon evidence deemed to be sufficient, it is a fair conclusion that such negligence was the proximate cause of damage. 'I think' said the court, 'the Tug and Barge Company was negligent in leaving the scow at the Spokane Street dock without permission, and without a watchman in the absence of this permission, even though the place was the privileged place of the *S. S. Eagle.*'"

The court remarked that from the evidence, which was conflicting, the trial court might reasonably have drawn a

contrary conclusion since there was no direct evidence to support the findings that no lights were exposed. Nevertheless the court said:

> "While there was a want of direct and affirmative evidence to support the finding that no lights were exposed, we do not think the finding was unwarranted. Under the circumstances, the natural burden was on the Tugboat Company to show that it exercised reasonable care for the protection of the barge, and if it exposed lights knowledge of the fact was in its possession and not in the possession of either of the other parties. It not only refrained from making such proof, but on the other hand offered to show that it was under no obligation in the premises."

Although Simpson testified in answer to a leading question of his counsel that on the morning of October 20th he looked over the "Drifter" and found her to be "in perfect condition" and that he "could not see anything wrong anywheres," it was proven on cross examination that he never made any such inspection (R., 65, 75).

On cross examination Simpson testified (R., 75):

> "Q. On the morning of October 20, what did you do? A. I was on the 'Drifter.' I went aboard the 'Drifter' to steer her like Captain Weston was doing before.
>
> "Q. You were on the 'Drifter'? A. I was on the 'Drifter,' yes.
>
> "Q. Did you do anything else? A. No, sir.
>
> "Q. You went to the 'Drifter'? A. Yes, sir.
>
> "Q. And steered her? A. Yes, sir.
>
> "Q. *And that is all you did from the time you got up that morning?* A. *Yes, sir.*"

Thus it appears beyond doubt that no inspection was made by Simpson on the morning of October 20th before

the "Drifter" left Fisher's Dock. It is, therefore, reasonable for the court to infer that the damage occurred during the night of October 19th when the "Drifter" was not guarded and probably unlighted. How could the appellant otherwise account for the damage when the trip from Fisher's Dock to destination was but five or six miles and the weather was fine and clear?

From the character of damage sustained to *The Drifter* the court might reasonably infer that the act which caused it was the result of negligence. In *The Kalkasha,* 107 Fed. 959 (C. C. A. 7), the court said, speaking through Judge Jenkins:

> "Although it may be said, the burden is upon the one alleging breach of contract of towage to show negligence or unskillfulness to his injury in the performance, still in some cases 'the result is a safe criterion about which to judge of the character of the act that caused it.' *The Webb,* 14 Wall. 406."

It is earnestly submitted that at all events there was affirmative proof of negligence on the part of the owners of the "White City" in the performance of towage, and surely there were facts established from which the court could reasonably infer that this damage was not caused by any act consistent with due care. The nature of the damage was "a safe criterion about which to judge of the character of the act that caused it." *The Webb,* 14 Wall. 406.

POINT IV.

The respondent has been guilty of requiring unnecessary parts of the record to be printed and should be charged, irrespective of the result, with the cost of printing.

Petitioner moved this court for an order to diminish the record already on file in this court by excluding the testimony taken before the special commissioner in the court below on the assessment of damages and the exhibits received on said hearings, upon the ground that it was wholly irrelevant and unnecessary, and further upon the ground that the printing of said testimony and exhibits would greatly enhance the expense to the petitioner.

The following matter was therefore sought to be excluded from the record:

Testimony taken before the special commissioner on the assessment of damages printed at pages 97-224.

Exhibits received in evidence upon said hearings printed at pages 226-228.

Report of special commissioner, exceptions to said report and order confirming report printed at pages 233-242.

Exhibits received upon said hearings before the special commissioner, printed at pages 299-302; upon the ground that it is irrelevant and unnecessary to this appeal and that the printing of said matter will serve only to enhance the expense to the petitioner.

This motion was opposed by the respondent and the court denied the motion, entering the following order on or about December 8, 1931:

> "Motion as to printing record denied, without prejudice to the authority of this court to make such order as to costs as it may deem proper, if it appear that either party shall have caused unnecessary parts of the record to be printed."

Prior to the making of this motion, the attorney for the respondent was asked to stipulate to omit the printing of that matter, which request was refused. An offer was made to print, however, any part of such matter which the respondent might feel was vital to the appeal, but this also was refused. The affidavit of James E. Freehill, one of petitioner's counsel on file in this court, states the following:

> "Prior to the making of this motion, I requested counsel for the appellee to stipulate to omit the printing of the testimony taken before the special commissioner on the assessment of damages as well as the exhibits received upon said hearings, but this request was refused although I stated that if there were any particular part of said matter which he felt was vital to the appeal, there would be no objection to the printing of said portion."

Respondent opposed the exclusion of the testimony taken before the special commissioner because it wished to avail itself of an opinion of a surveyor, Jolly, who was forced by respondent's counsel to speculate or guess as to the cause of damage. Jolly had no personal knowledge of the cause of damage. Counsel for the respondent had previously characterized any opinion of this witness in the following language (R., 100):

> "Mr. Sullivan: I object to that. He is giving a description of the physical damage to this boat. That doesn't call upon him to give any opinion—speculative opinion as to how it happened."

This testimony at all events was not given upon the trial before Judge Woolsey and should not therefore be considered on this appeal. It, of course, possesses no evidentiary value.

No point was made by the respondent in the United States Circuit Court of Appeals, either in the oral argument or on the brief that there was any error committed by the special commissioner in the assessment of damages, and it is clear from the opinion of the Circuit Court of Appeals that the reversal was based solely on the question of liability. Under the circumstances, the cost of printing this unnecessary matter, which consumes many pages of the record, should be imposed upon the respondent, pursuant to Rule XIII, subdivision 9, of the rules of this court.

In *Ball & Socket Fastener Co.* v. *Kraetzer,* 150 U. S. 111, this court said:

> "We are, therefore, of opinion that the court below committed no error in its disposition of the case; but, in view of the fact that the appellee has seen fit to encumber the record with copies of some fifty immaterial patents, we think it a proper case for the application of the 10th rule, which authorizes us (paragraph 9) to impose costs upon an appellee guilty of requiring unnecessary parts of the record to be printed, and that he should be charged with half the cost of printing the record on this. Care should be taken that costs are not unnecessarily increased by incorporating useless papers, and that the case is presented fairly and intelligently. *Railway Co.* v. *Stewart,* 95 U. S. 279, 284."

POINT V.

The decree of the court below should be reversed.

We respectfully submit that the decree of the court below dismissing the libel should be reversed and a decree rendered in favor of the petitioner for his damage.

Respectfully submitted,

WILLIAM F. PURDY,
NEIL P. CULLOM,
JAMES E. FREEHILL,
Counsel for Petitioner.

Dated, December 30, 1931.

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CHARLES ELMO

IN THE

Supreme Court of the United States

JUNE TERM, 1931—No. 217

WILLIAM STEVENS,

Petitioner,

against

The vessel "WHITE CITY," her engines, tackle, apparel, etc.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE APPLICATION OF THE PETITIONER FOR A WRIT OF CERTIORARI.

SANFORD H. COHEN,
FLORENCE J. SULLIVAN,
Counsel for Respondent,
505 Fifth Avenue,
New York City.

HENRICKS & LUDEMANN, INC., New York City

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IN THE

Supreme Court of the United States

WILLIAM STEVENS,
Petitioner,

against

The vessel "WHITE CITY," her engines, tackle, apparel, etc.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE APPLICATION OF THE PETITIONER FOR A WRIT OF CERTIORARI.

The Opinions of the Courts Below in this Action.

The opinion of the United States Circuit Court of Appeals is reported in

48 F. (2d) 557; 1931 A. M. C. 1844; and is also printed at page 413 of the Transcript of the Record.

The opinion of the District Court of the United States for the Southern District of New York is reported in

35 F. (2d) 1006; and printed in the Transcript of Record, page 306.

The petitioner is asking the Court to overrule the doctrine of stare decisis in this class of cases in the United States Supreme Court and in other courts, to the end that he may recover on his assigned claim of $1,410.35 (p. 329).

As this application is based on the full record in this action which was before the United States Circuit Court of Appeals, and, therefore, searches all the law and facts, it is highly desirable on the part of the respondent to here

present the informative and controlling elements of the record as clearly and briefly as possible and in order in a condensed narrative form. To that end, we beg the indulgence of the Court.

The History of this Litigation.

The contract on which all this litigation is based, is in the form of a letter, which in full is as follows:

"LIBELLANT'S EXHIBIT I, OFFERED AT TRIAL
(May 9, 1929, pp. 297-298).

Telephone
Cable 'Excellent, New York' Sedgwick 7800

JOHN J. AMORY
President
WILLIAM J. PARSLOW
Vice-President
BRUCE SCRIMGEOUR
Sect. & Genl. Mgr.
WILLIAM K. PARSLOW
Treasurer

Designers & Builders of
Pleasure and Commercial
Craft and Their
Propelling Machinery

Speedway
CONSOLIDATED
SHIPBUILDING CORPORATION.
Morris Heights, New York City
Formerly
Gas Engine & Power Company and Charles L. Seabury
& Company Consolidated.

October 13, 1925.

Mr. Alec Simpson,
151st St. & Hudson River,
New York City.

Dear Alec:

Confirming our telephone conversation of this day, and agreement, please have your work boat 'Hilda'

here at our works on Monday morning, the 19th, at 6 A. M. to tow 45' launch on cradle from Morris Heights to the Trans Marine Steamship Company, alongside of steamer 'Suscolanco' at Port Newark, N. J.

See Captain Lewis on arrival at pier. It is important that this boat arrive at the steamer before 3 P. M. that same day.

Yours very truly,

CONSOLIDATED SHIPBUILDING CORPORATION,
W. A. ROOS, JR.,
Sales Dept.

WAR:T" (pp. 297-298).

This contract was never assigned to William Stevens or anybody else. It is just where it was on the date it was made.

By mutual consent of the parties to this letter, changes were made with respect to its provisions and as changed, was carried out on October 19th and 20th, 1925.

The changes made were as follows:

1. The work boat "Hilda" referred to in the letter became disabled before October 19th, 1925, and could not be used; this accident occasioned about two hours delay in starting to tow.

2. In the emergency resulting from the work boat "Hilda," being out of order, the "White City," a pleasure motorboat similar in style and design to the "Drifter" was substituted. The "White City" was not a tug boat.

WILLIAM A. ROOS, JR., in the Sales Department of the Consolidated Shipbuilding Corporation who signed the letter, testified for the petitioner, about the substitution

of the "White City" for the "Hilda," at page 55, folio 165, as follows:

> "Q. Will you give it?
>
> A. They said that they could not send the 'Hilda,' but would send another boat. I said, 'Well, if the boat is big enough,' and he gave me the dimensions, and I said, 'That's agreeable to me,' something like that.
>
> Q. Did he mention the name of the boat he was going to send?
>
> A. Yes; the 'White City.'"

Alexander Simpson to whom the letter is addressed, at page 349, explains why he could not tow the "Drifter" with his work boat "Hilda"; "something happened to it; the boat was broken down; she couldn't go." In reply Roos said:

> "Well, why don't you let the boys tow it." "I (Alexander Simpson) says: 'All right.' So the boys own the 'White City,' sent her over there; they took her over" (p. 349, fols. 7 to 9).

The "boys" were Herbert N. Simpson, son of Alexander Simpson, and William A. Rhodes, his son-in-law (p. 80, fol. 238). They were engaged in excursion business (p. 80). William A. Rhodes was a motorboat captain and was licensed as such (p. 82). The "White City" "was a party boat, an excursion boat; it was not a tug boat" (p. 96, fol. 287). William A. Rhodes and Herbert N. Simpson owned the "White City" (p. 382, fol. 108). It was used for pleasure purposes and for transportation of passengers on excursion trips (p. 383, fol. 109).

Before Alexander Simpson's work boat, "Hilda," also called "Hilda" 2d, broke down, he was to do the towing of the "Drifter" with his work boat "Hilda" (the letter, also p. 349, fol. 7).

The Status of the Consolidated Shipbuilding Corporation in this Action.

There were two contracting parties with respect to the towing of the "Drifter" as appears from the letter above printed, and also, from the statement of petitioner's counsel in opening the case in the United States District Court.

The party that wanted the towing done, was the Consolidated Shipbuilding Corporation that built the motorboat "Drifter," and the party to do the towing was Alexander Simpson. At that time, the Shipbuilding Company was the owner and in possession of the "Drifter"—it had not been delivered to Mr. Frost for whom it was built, and was not until about a month later. All doubt is removed as to ownership at page 64, folios 190-191, where Mr. Roos testifies as follows:

> "The Court: Then you remember that Frost did not own it (the 'Drifter') at that period?
>
> A. As I recall it, he instructed us to deliver it to the Steamer.
>
> Q. Then the boat (the 'Drifter') was at your risk?
>
> A. Yes, sir."

The trial counsel for the petitioner, at page 46, fols. 137-138, makes this point very clear indeed:

> "Mr. Freehill: We established that the contract was made with Alex Simpson, the father. He did not own the 'White City.' We joined the two owners of the 'White City,' as there was doubt about which of the parties was liable on the contract of towage. The Court held that the contract was made with Alex Simpson, and that he had hired these two boys as his agents, and that Alex Simpson was responsible on the contract, but on that action we could not hold them for negligent towage, because we were suing on the agreement."

The Petitioner is still suing on this contract in this action that has never been assigned to him by the Consolidated Shipbuilding Corporation. He also has an action on it pending in the State Court.

The Contract Between the Consolidated Shipbuilding Corporation and T. C. Frost, a Resident of Texas.

This contract provided that the Shipbuilding Corporation that constructed the "Drifter" for T. C. Frost of Texas, would make delivery of the same to the Steamer "Suscalanco" at Port Newark, New Jersey. Captain Lewis was the Superintendent for the Steamship Company that was to transport the "Drifter" to Texas. For reasons stated herein, the "Suscalanco" sailed from Port Newark in the afternoon of October 19th, 1925, before the "Drifter" arrived. The Consolidated Shipbuilding Corporation did not deliver the "Drifter" to T. C. Frost until after October 19th, 1925 (p. 63, fol. 189). Delivery was actually made about November 5th, 1925 (p. 276, fol. 827).

On October 20th, 1925, Albert Bauer, an employee of the Consolidated Shipbuilding Corporation, in charge of shipping, received the "Drifter" at Port Newark (p. 71). He was there waiting to receive the yacht and see it put aboard the ship (p. 72, fols. 214, 215). Because of the damages to the "Drifter," Mr. Bauer who was in charge of the shipping for the Consolidated Shipbuilding Corporation, did not deliver it to the Steamship Company but immediately brought it back to the Consolidated Shipbuilding Corporation for repairs, to its place of business at Morris Heights, New York City.

There is no doubt about the time when the "Drifter" was delivered by the Consolidated Shipbuilding Corporation to T. C. Frost of Texas, for whom the boat was built. This appears from the testimony of William J. Bolen who

was called by the petitioner at page 191, folio 573. At page 192, folio 576, Mr. Bolen testified:

> "Q. By whom were you employed?
> A. The Consolidated Shipbuilding Corporation."

Continuing at page 193, folios 577-578:

> "Q. What are your duties?
> A. I am cashier of the company and issue all orders to the shop for work to be done. All orders go through my hands."

The same witness testified at page 276, folio 827:

> "Q. And where was delivery to be made?
> A. At Port Newark—he (meaning Mr. Frost) named the steamer that he would like it to go on.
> Q. Had you made delivery of the boat when it went down?
> A. No, sir.
> Q. At the time it was damaged?
> A. No, sir.
> Q. When was delivery made?
> A. Delivery was made about the 5th of November I think it was, somewhere in that neighborhood."

It is clear, without argument, that up until the boat was delivered to Mr. Frost for whom it was built, it was the property of the Consolidated Shipbuilding Corporation and in its possession.

There is no explanation in this record from the petitioner why he did not obtain an assignment of the contract to him made between the Consolidated Shipbuilding Corporation and Alexander Simpson. The cause of action, if ever one existed, is confined to that contract. There is still pending an action in the State Court between William Stevens and Alexander Simpson (p. 308, fol. 923).

The facts in this case especially in the absence of any explanation to the contrary, make it conclusive:

1. That the Consolidated Shipbuilding Corporation had no contractual relations with the owners of the "White City"; but did have with Alexander Simpson;

2. That the "White City" did precisely what the Consolidated Shipbuilding Corporation directed through its own Captain Weston who was in charge of the towing;

3. That there was no negligence on the part of the "White City"; but there was negligence on the part of the Consolidated Shipbuilding Corporation;

4. That the damage to the "Drifter" even if it occurred during the voyage, was one of the perils of the sea about which the Consolidated Shipbuilding Corporation knew, and which was called to the attention of Mr. Roos in charge of the Sales Department, before October 19th, 1925, by Alexander Simpson;

5. That T. C. Frost had no contractual relations with either Alexander Simpson or the owners of the "White City," and had no cause of action to assign against them.

6. That the alleged assignment from T. C. Frost to the "Dummy," William Stevens, referred to in the libel at page 5, folio 14, and in the amended complaint of the petitioner in his former action in the State Court (Municipal Court of the City of New York, p. 31, fol. 92) was for the sole purpose on the part of the Consolidated Shipbuilding Corporation, to escape from its contract with Alexander Simpson. This whole transaction is a sham and a subterfuge;

7. The Consolidated Shipbuilding Corporation committed a gross act of negligence as a matter of law

when its Captain Weston in charge of the towing, abandoned the "Drifter" at Fisher's Dock on the night of October 19th, 1925, during the course of the voyage and before the point of destination was reached; without him the crew was insufficient (p. 285, fol. 854). The particulars of this abandonment appear at page 90, folio 268;

8. The Shipbuilding Corporation in truth and in fact, did the towing of the "Drifter" and deliberately gambled with the dangers encountered and the damage to the "Drifter."

If the gamble were successful it would have saved $75.00 on the towage.

The Consolidated Shipbuilding Corporation as appears above, knew that the "White City" was not a tug or a work-boat and that its owners, the "boys" were not in the tug business. *The "White City" was pressed into service in an emergency arising from the break-down of the work boat "Hilda" that was to do the towing.* To save money, it employed two "boys" who had a pleasure motor boat, the "White City" to make the trip. This boat was similar in construction to the motor boat "Drifter" (p. 383, fol. 110). In this way, the Consolidated Shipbuilding Corporation saved $75.00 for the alleged towing by the "White City," which was one-half the charge if the towing was done by a tug. The regular towage would have been $150.00 if done by a tug. This is the testimony submitted in behalf of the petitioner and appears at page 402, folio 168; the item there is as follows:

"Tug Boat Charges to & from Steamer $150.00."

This was for towing the "Drifter" back from Port Newark after the damage. This was not done by the "White City." All the "boys," Herbert N. Simpson, and William A. Rhodes, the owners of the "White City" got was $75.00.

This sum was paid by the Consolidated Shipbuilding Corporation to Alexander Simpson, and by him turned over to the "boys," the owners of the "White City." This appears from Libellant's Exhibits 3 and 4, printed at pages 303-304, and page 357, folio 31. The check for the payment of this $75.00 was made by the Consolidated Shipbuilding Corporation to the order of Alexander Simpson (p. 304) and endorsed by him and turned over to the owners of the "White City" (p. 385, fols. 115, 116).

The towing of the "Drifter" by the "White City" was under the direct control of the Consolidated Shipbuilding Corporation.

This statement is true as a matter of record.

1. The contract fixed the starting point and destination which determined the course (pp. 297-298).

2. Captain Weston in the employment of the Shipbuilding Corporation was placed in charge of the tow and left with it.

Page 286, folios 856-857 (Mr. Bolen testifying):

"Q. Was Weston a laborer?
A. He was a dockman.
Q. A dockman?
A. Worked down on the dock.
Q. And he left with the 'White City' and the 'Drifter' on October 19th, 1925, to go to Port Newark to make delivery of the 'Drifter,' is that it?
A. Yes, sir; he did."

Page 285, folios 853-854:

"Q. Why did he (Weston) go down?
A. To help the delivery of the boat—he was on the 'Drifter.'

Q. Why did he go at all?

A. They didn't have sufficient help on the boat to take care of it."

Mr. Roos testifying at page 58, folio 174:

"Q. No; do you recall that?

A. Yes. The company did place a man on that boat.

Q. What company?

A. The Shipbuilding Company.

Q. Why was he placed there?

A. Because it is the custom to have a man go alongside of the steamer to take a line on the dock, *to see that the boat is fended off on the dock.*"

At page 62, folio 184:

"Q. How long had he (Weston) been a boatman?

A. He worked for Tom Turner. He had been captain on boats and engineer. I had known him for many years before this.

Q. And you say he was competent to take care of this boat and do everything with reference to the 'Drifter'?

A. As to his duties, yes, sir. He was competent to perform his duties."

Folio 185:

"Q. Was he in charge of the 'Drifter'?

A. Yes, sir."

The "White City" arrived at the Consolidated Shipbuilding Corporation plant on the Harlem River about 8:30 in the morning of October 19th, 1925, and layed out in midstream a half hour before the employees of this company finished the work of attaching the "Drifter" and the cradle

belonging to it. These employees used a rope about 40 feet long to connect the "White City" with the "Drifter" and another rope about 40 feet long to connect the cradle to the "Drifter." The tow started about 9:00, in the following order:

> "White City" manned by Herbert N. Simpson and William A. Rhodes;
> "Drifter" manned by Captain Weston;
> The cradle being connected with the "Drifter."

It is between 25 and 30 miles from Morris Heights to Port Newark (p. 105, fol. 313). Captain Weston and the employees of the Consolidated Shipbuilding Corporation supervised and actually did the work incident to the starting of the tow. The course was down the Harlem River to the East River, across the Upper Bay, through Kill van Kull, and to Newark Bay, to the Transmarine Corporation (pp. 84, 85). This course was selected by the Consolidated Shipbuilding Corporation through Captain Weston. Mr. Roos, in charge of the Sales Department of this corporation was present at the shipyard as the tow started (p. 58, fol. 172).

As appears herein, the course selected by the Consolidated Shipbuilding Corporation was inherently dangerous, especially to the "Drifter," whose exterior covering was only a half inch thick. The testimony of Albert Bauer, shipping clerk, on this point is printed at page 109, folio 326:

> "The Court: And how thick was the side of the boat?
> The Witness: The plank in the hull I don't think was more than half an inch. Something like that. I don't think it was half inch planking" (also at p. 94, fol. 281).

The Consolidated Shipbuilding Corporation did not put any fenders on the sides of the "Drifter," nor did it otherwise protect the sides of the "Drifter," which was not made for rough water (p. 94, fol. 281).

Before October 19th, 1925, Alexander Simpson called the attention of Mr. Roos to the inherent dangers of the waters through which the tow would have to pass down the Harlem River, and advised Mr. Roos to let him take the "Drifter" over to his boat house on the Hudson River at 151st Street. Testimony on this point given by Alexander Simpson, is printed at page 350, folio 11:

> "Q. Tell us what you said to him.
>
> A. And I said I would take it over to my place and leave it over there over night, and take it down the next morning, *if the conditions would be right.* Well, he said, 'No, you can't do that. *You must take it the day you are going to take it to Port Newark.*' "

Folio 12:

> "Q. What did you say about the tide?
>
> A. Well, I said the tide would be in our favor in the morning early to take it from our place if I got it the day before.
>
> * * * * * * * *
>
> A. If you have a tied against you, it is very hard pulling, and you get all the drift-wood against you; you are forcing up against the drift-wood the conditions is against you all the way."

Page 351, folio 1:

> "That is what I said to Mr. Roos."

Folio 14:

> "Q. That was before the 'Drifter' was taken down to Port Newark?
>
> A. Yes, sir."

Page 352, folio 17, states that he had been in the boat business for 28 years and that he was familiar with the waters, and at folio 18 (p. 352), he states that he frequently found heavy logs and drift-wood in these waters. At folio 19 (p. 353), he stated that "sometimes you will get a stout one going down with the draft, and sometimes you will get half of a beam going down with the draft."

Folio 20 (p. 353):

"By the Court:

Q. There is liable to be anything going down?

A. Sure, there is liable to be anything going down."

Folio 21 (p. 353):

"Q. You have heard the description of the injury to this boat, the 'Drifter,' described here, about the water-line?

A. Yes, sir.

Q. And this that we speak of, would that cause that damage?

A. Of course it would, yes."

At page 354, folio 22, the witness continues:

"Well, the logs, sometimes they have got spikes in them; sometimes they have got bolts in them. They are apt to have anything in them."

At folio 23:

"Q. And if the 'Drifter' was being conveyed out against the tide and the floating logs and wood coming against it, would that increase the danger?

A. That would do the damage."

At page 390, folios 130-131, further evidence is given as to the perils of the waters through which the towing was done:

> "Q. The heavier the log, the more submerged it is, floating towards the top?
>
> A. When it is waterlogged, twenty feet of it may be submerged and one foot may be on the water surface.
>
> Q. And going against the tide, with the drift-wood coming with it, would that increase the danger of drift-wood?
>
> A. Yes."

Folio 132 (same page):

> "Q. Could the damage that Mr. Bauer showed you have occurred from contact with drift-wood?"

Page 391, folio 133:

> "A. It could."

The course actually taken by the tow under the direction of Captain Weston brought this thin-shelled "Drifter" through the most dangerous waters on the Atlantic Coast. This place is known as Hell Gate (p. 85, fol. 255) and is about Ninety-sixth to Ninety-second Street, East River (p. 86). The witness states:

> "The condition at Hell Gate,—the water is very rough and very bad, and on account of the cross currents, there's five currents come in at one place, and it's a narrow channel" (p. 86, fol. 256).

Had Mr. Roos followed the advance of Alexander Simpson, Hell Gate would have been avoided and the "Drifter" would have been taken up the Harlem River and down the Hudson River to the Simpson Boat House.

When the tow, consisting of the "White City," the "Drifter" and cradle, was in the East River, just below Hell Gate, under the Queensboro Bridge, the line connecting the cradle with the "Drifter" broke. This line, the rope, belonged to the Consolidated Shipbuilding Corporation and placed there by it. Testimony in that respect is at page 86, folio 258:

> "Q. I was asking what happened.
>
> A. That line broke, the line that was attached from the cradle to the 'Drifter' broken underneath Fifty-ninth Street Bridge, and Captain Weston called our attention to it, so we immediately turned around and he hooked on to the cradle again and we proceeded on our way."

This delay was from fifteen or twenty minutes to a half hour (p. 87, fol. 259).

Page 87, folio 260, the witness continues:

> "We came down the Bay and through Kill van Kull and we saw the 'Suscalanco,' the steamer that was supposed to take this 'Drifter' on her deck, we seen her going out, and she was under power."
>
> "Q. What time was this?
>
> A. Around five o'clock; maybe it was a little bit earlier. It was around that, in the evening. And so Mr. Rhodes says, 'I don't know what to do. We better go in and call up. There's the boat that the "Drifter" is supposed to go (fol. 261) on. You'll have to call up and see if they have made any different arrangements, and we called to Weston," and he said, *'Yes, pull into a dock and find out.'* So we went into the dock and he went to call up, and when he came back and he said that the party up there at the Consolidated seemed to be a watchman of some kind, and the only think he could say was to bring the boat back."

Then they called up Alexander Simpson and "he said that the boat was to go on another steamer, *that the orders were changed.* He said that we should take the boat to Port Newark that next day (p. 88, fol. 262) or as soon as we could get there. So we come back to the dock (Fisher's Dock at Bayonne, fol. 260) and we made the 'Drifter' fast alongside of the pier there and made the 'White City' fast, and we put fenders over the side and we stayed there over night."

"Q. What was done with the 'Drifter'?

A. This was at Fisher's Dock, at Bayonne. The 'Drifter' was tied alongside of the dock and we put on big round rubber tires, fenders, to fend her off from the dock, so that she wouldn't bang or scratch or hurt herself. This was precisely what Mr. Roos directed" (pp. 58-59, folios 174-175),

Folio 263:

"Q. Is this smooth water, or rough, or what?
A. Smooth. It's inside.
Q. You go in some distance to get in there?
A. Yes, sir."

The witness states that it is a dock like the Erie Basin.

"Q. Where did you stay that night?
A. On the 'White City.'
Q. How far was the 'Drifter' from the 'White City'?
A. Maybe about fifteen feet, ten or fifteen feet."

Folio 264:

"Q. Why didn't you continue on to Port Newark on the night of the nineteenth?"

Folio 265:

"A. Because it was getting darker just then and we thought it would be much better if we got an early start in the morning and took her out in daylight. Also because of change in the orders" (pp. 87-88, fols. 260-262).

The next morning, the owners of the "White City" got up about five o'clock (fol. 266) and looked over the boats and discovered nothing wrong with them (fol. 267).

Captain Weston left the tow about 7:00 or 7:30, on the night of October 19th, 1925 (p. 89, fol. 267). The following testimony is given by Herbert N. Simpson:

"Q. What had become of Weston?

A. He left the night before. He said he wanted to go home."

Page 90, folio 268:

"Q. What time did Weston leave the tow?

A. On the nineteenth, the night before, around seven or seven-thirty, *after he had the boat tied up alongside of the pier.* He said, 'I'm not going to stay around here all night.'"

Fisher's Dock where the tow tied on the night of October 19th, 1925, is about five or six miles from Port Newark (p. 90, fol. 269). On the morning of October 20th, 1925 (fol. 269), the "White City" with only two of the crew left, Herbert N. Simpson and William A. Rhodes, Captain Weston having left the night before, proceeded from Fisher's Dock to Port Newark, starting about 6:30 A. M. and arrived at Port Newark between 7:30 and 8:00 o'clock that morning.

The Libel.

The libel is printed at pages 4 to 6. The facts constituting the alleged cause of action are not printed.

The trial counsel for the petitioner attempted to define the alleged cause of action set up in the libel at the opening of the trial in the United States District Court. What he there said is printed at page 100, folio 300, and is as follows:

> "Mr. Freehill: Under this contract he was to take the 'Drifter' to Port Newark, and if he went off his course and did not make delivery at the time and place specified in the agreement, that is a breach of contract, deviation."

There is no evidence that anything happened during the "deviation."

The libel contains no allegations charging negligence. There is not a word of evidence of negligence in the case as against the "White City." The evidence quoted herein shows that the "White City" did not deviate from its course and followed the changed order of the Consolidated Shipbuilding Corporation. The alleged "deviation" was short and to 'phone for further orders. The facts in this respect are printed at pages 87-88, folios 261-263. There is not a word of evidence that anything happened during the alleged deviation. The alleged deviation was the result of changed orders and was also an act of care and caution on the part of the "White City" to avoid the dangers of the night. The abandonment by Captain Weston left the tow insufficiently manned.

The Answer.

The answer is printed at pages 8 to 38, and briefly stated, pleads a general denial (p. 9), and two separate defenses (p. 9, fol. 27 and p. 19, fol. 55).

The substance of the first defense is, that to the knowledge of the Shipbuilding Corporation, the "White City" was not a tug, that it was a pleasure boat; that this corporation controlled and did the towing of the "Drifter," and that the owners of the "White City" were under the immediate control and direction of this corporation, and complied in all respects with its directions, and that they acted in concert with the other employees; that all attachments, ropes, hawsers and all necessary items relating to the tow, including its own captain, Captain Weston, were furnished and placed in charge of the tow by the Consolidated Shipbuilding Corporation (pp. 9 to 19).

The second defense sets forth previous and identical litigation and subject matter between the parties to this action that were determined in favor of the owners of the "White City," and that that result was a bar to this action and *res judicata* as to person and cause of action.

The Action of William Stevens (the Libellant Here) in the State Courts.

This litigation was started by William Stevens on March 27th, 1926 (p. 27, fol. 81), in an action in the Municipal Court of the City of New York, Borough of Manhattan, First District (p. 27). The only plaintiff then, was William Stevens, the petitioner here, and Alexander Simpson was the sole defendant (p. 27).

The complaint in the cause of action in the State Courts between the same parties, set out the same facts as are here included in the libel. In his decision and opinion in this action in the United States District Court, Judge Woolsey (p. 307, fol. 921) held as follows:

> *"The issues between the plaintiff and Herbert N. Simpson and William A. Rhodes in the Municipal Court case seem to have been substantially the same as they are here."*

This opinion (p. 308) shows that the State Court action was resolved in favor of said Herbert N. Simpson and William A. Rhodes, owners of the "White City" and thereafter it was confined to William Stevens, plaintiff, against Alexander Simpson, defendant (that action is still pending in the State Court; at the trial, the jury disagreed).

Before that action was started in the Municipal Court, William Stevens never had any dealings with the owners of the "White City" nor with Alexander Simpson. There is not a word of evidence in this prolonged litigation to the contrary. Who William Stevens is or what he did does not appear in this case.

His relation to the subject matter of this litigation is that of a person gambling with the State and United States Courts and their processes; it is tantamount to champarty.

He was defeated in the State Courts by the owner of the "White City" on the claim in this action (Opinion of Judge Woolsey, pp. 307, 308) (p. 46, fol. 138).

The action in the State Court was in negligence and specified the same facts as are contained in the libel in this action (pp. 30 to 32, as to the complaint; pp. 4 to 7, as to the libel). The libel sets up a breach of contract; no negligence is alleged. It is a towage contract, simpliciter, and does not put the tow in bail to the tug (Opinion U. S. Circuit Court of Appeals, in the case at bar, 48 F. [2d] 557, and cases cited).

The owners of the "White City" were brought into the State Court action on the application of William Stevens by an order of the Municipal Court dated May 17th, 1926. The amended complaint bringing them in was verified by him, and at paragraph "Seventh" thereof (p. 31, fol. 93) contains this statement by him:

> "SEVENTH.—That plaintiff is in doubt as to which of the defendants is liable and, therefore, under Sections 213 and 219 of the Civil Practice Act, joins them all to the intent that the Court may determine which of the said defendants or all of them are liable."

That court did *"determine"* on December 8th, 1926 (p. 299, fol. 896) that the owners of the "White City," Herbert N. Simpson and William A. Rhodes were not "liable" and the action was dismissed as to them (Opinion, p. 308, fol. 923).

The good faith of Stevens when he swore to that paragraph is open to grave doubt as he was in possession of the assignment before he started the first action against Alexander Simpson as sole defendant (p. 27 and 31, fol. 92). There was only one assignment (p. 51, fol. 151).

For reasons of his own, William Stevens, brought his first action in the First District Court of Manhattan. Neither plaintiff nor defendant in that action, resided in that district. If he did not know that that was the wrong district, his attorney certainly did. This made it necessary for defendant to make a motion to change the place of trial to the right district. This motion was granted. This selection of the wrong district had a purpose; it was not an accident.

The Municipal Court action was tried on December 7th and 8th, 1926, in the 7th District before Judge Davies and a jury. The judge dismissed the action as against the owners of the "White City," and no appeal was ever taken from that order on dismissal by the plaintiff therein, William Stevens. His right to appeal has expired. He had only 20 days from December 8th, 1926, to so appeal. The only defendant then left was Alexander Simpson and as to him the jury disagreed; that action has not been tried since. It is still pending.

Nothing further was done by Stevens until June 20th, 1927, when the libel was filed in the above entitled action in the United States District Court (p. 1).

It is as evident as though printed in words, what William Stevens had in mind before and at the time of filing the libel.

He then knew that the State Courts had passed on his claim and held that there was no liability therefor on the

part of the "White City" or its owners, Herbert N. Simpson and William A. Rhodes.

He knew that the decision of the State Court was right and could not be reversed and took no appeal.

He knew that he could devise no other form of action on his claim that would be entertained by the State Courts. He was forever barred therefrom as against the "White City" and its owners.

After a delay of over six months (from Dec. 8th, 1926, to June 20th, 1927), he brought the present action in the United States District Court. Instead of making the owners of the "White City" parties to the action, he confined it to the "White City" omitting the owners.

In form, at least, this gave him a paper difference in the name of the defendant. In this way, he sought to avoid identity of person in the action in the State Court and the United States Distfict Court. This was a failure as the decision in the United States Circuit Court of Appeals shows.

Even with all of this his trouble was not over in his new venture.

Some method had to be devised to give at least a paper difference in the subject-matter of the controversy in the State and United States Courts.

No matter in what court his assigned claim for damage was tried he knew it would have to survive or perish on the contract made between the Consolidated Shipbuilding Corporation and Alexander Simpson referred to and printed at pages 297, 298 (Libellant's Exhibit I).

The cause of action in the State Court was for negligence; so in his libel he sets out a cause of action on contract, in an effort to make it appear that the subject matter in the State Court is different from that in the United States Court. This is also a failure on its face. It is a failure as a matter of record; the camouflage is ineffective; it is a sham pleading (*Steinbach* v. *Relief Fire Ins. Co.*, 77 N. Y. 501). A change in issues, that is, a

change in the complaint is not a change in parties or subject matter (77 N. Y. 501).

The young attorney in the office of the attorney of record for the petitioner, who has had charge and control of the assigned claim of William Stevens and all actions in the four counts it has been in so far (the First District Municipal Court, Borough of Manhattan; the Second District of the same Court; the United States District Court; and the United States Circuit Court of Appeals) personally tried the action for the petitioner in the United States District Court, where Judge Woolsey asked Mr. Freehill, the attorney for the libellant the following question (p. 45, fol. 135):

"The Court: Mr. Stevens was the party, as assignee, of the same man suing in the Municipal Court?

Mr. Freehill: It was an action on contract there, not for negligent towage.

Mr. Sullivan: No it was negligence. I have the charge of Judge Davies right here, and I have their complaint. There is no shift on that. They are the identical parties and it is the same subject matter.

Mr. Freehill: This is a different type of action (Mr. Freehill's idea is that if a complaint in negligence is changed to one on contract although he retains the same parties subject matter and evidence, he can avoid the rule relating to *res adjudicata*. The authority cited shows he can not do this).

Mr. Sullivan: Whether they concede it or not, I have the record to prove that it was the same (p. 46, fol. 136) party, the same assignment, the same transaction."

Folio 137:

"The Court: *Of course the subject matter must be the same.*

Mr. Freehill: We established that the contract was made with Alex Simpson, the father. He did not own the 'White City.' We joined the two owners of the 'White City,' as there was doubt about which of the parties was liable on the contract of towage. The Court held that the contract (fol. 138) was made with Alex Simpson, and that he had hired these two boys as his agents, and that Alex Simpson was responsible on the contract, but on that action we could not hold them for negligent towage, because we were suing on the agreement.

The Court: Mr. Sullivan has pleaded *res judicata*. He must establish it to defeat your action. Now, what has he got that is proper evidence in the United States Court to establish the fact of this Municipal Court proceeding?

Mr. Sullivan: I have all the pleadings."

Identity of subject-matter and person in the State and United States Courts are conceded as a matter of record at page 47, folio 139:

"Mr. Freehill: Take the copy of the complaint. I concede that these papers are the file papers in the Municipal Court. They show the entire subject matter and the persons connected with it, and establish the identity of the subject matter and those parties in this action."

Discussion is continued through the balance of pages 47 and 48, where at folio 144, the Court admits in evidence the amended complaint in the Municipal Court case annexed to claimants' answer and the same is marked Claimants' Exhibit A on the *res judicata* plea, and the Court also admitted in evidence the answer of the defendants in the same Municipal Court case and it is marked Claimants' Exhibit B on the *res judicata* issue (p. 49, fol. 145).

The Petition and Brief of Petitioner.

The "Petition and Brief for Writ of Certiorari" herein finally strips this prolonged litigation of all semblance of good faith and conformity to any known practice in the State or United States Courts.

At page 1, paragraph III, of that Petition and Brief, the petitioner defines his cause of action as follows:

> "III. The petitioner (libellant) instituted this action by filing of a libel and complaint against the respondent (vessel 'White City') for damages sustained to a motor yacht, the 'Drifter,' arising out of a breach of a contract of towage (pp. 4-7)."

The confusion, evasion and over-reaching on the part of the petitioner's counsel at the trial in the United States District Court as appears from the record (pp. 46, 47) caused the Court (p. 47, fol. 141) to make the following statement:

> "The Court: Why do you not put that in? Are you going to put the record in? I want to emphasize the fact that I believe in cases being tried like English cases, and it is going to meet with great displeasure on my part if anybody is going to be technical where technicalities are not necessary. Is that the record in the case?
>
> Mr. Sullivan: Here is the testimony."

Thereupon Mr. Freehill made the concession printed at page 47, folio 139, and the pleadings in the Municipal Court (Claimants' Exhibits A and B) were admitted in evidence (p. 48, fol. 144).

The petitioner has been engaged in his vexatious litigation for over five years (March 27th, 1926, p. 27, fol. 81, to the present, and this application will continue it to

October, 1931). He has been in two State Courts where he finally lost and has been in two United States Courts where he finally lost. He is now seeking to enter a fifth court, not as a matter of right but as a matter of judicial discretion and courtesy. The amount of the judgment involved is $1,410.35. No new question of law is involved. The question now sought to be raised has been passed on by the United States Supreme Court. This is conceded in petitioner's brief at page 10, Point I. That brief is devoid of any reason or shadow of a reason why the doctrine of *stare decisis* should be changed. What the petitioner has done, is the best proof that that doctrine should be continued as a check to this sham and fraudulent litigation.

This is the reason why this analysis of the petitioner's record is made. We are submitting these items to show the Court that this application and action are without merit, vexatious and an abuse of the processes of the State and United States Courts.

The character of this application is fixed and determined by the contents of the record now before the Court.

The question first to be settled is, does the petitioner come into this court with clean hands?

Has he a substantial grievance inherent in the facts and within the established law?

Is he engaged in fabricating a grievance?

The record now before the Court answers all these questions and that record has been made by the petitioner. "His sins have found him out."

The temerity of the petitioner and those acting with him is such, that they still continue at their attempts at deception in this Court.

The petitioner in his brief (as above quoted), page 1, says his libel and complaint "arise out of a breach of contract."

This contract is printed at pages 297-298.

The petitioner's attorney at page 40, fol. 120, in opening his case to the United States District Court, made this statement:

> "Mr. Freehill: The action was brought against the 'White City' in rem for negligence."

This is incorrect as a matter of record (pp. 4 to 7), also *The White City*, 48 F. (2d) 557, and petitioner's brief, page 1, paragraph III.

The petitioner's attorney at page 45, folio 135, referring to the action in the Municipal Court, made the following statement:

> "Mr. Freehill: It was an action on contract there, *not for negligence.*"

This statement is incorrect as a matter of record. (Amended Complaint, pp. 30, 31.)

These conflicting positions of the petitioner continue at page 4 of his petition and brief (Item 4, subdivision a) where he speaks of "bailee."

There is nothing in what he describes as his "libel and complaint" (his brief, p. 1, Item III), or the "libel and complaint" printed at pages 4 to 7, that refers to "bailee" or negligence. Towing the "Drifter" (p. 4) does not make the "White City" a bailee so as to give rise to any adverse presumptions. The contract of towing must be alleged; the pleading on its face must show the facts from which the Court may be advised of what specific duties were assumed by the tug; whether or not it was a bailee with the terms of the bailment; and how and in what manner those duties were violated by the tug. The word "tug" does not take the place of a libel or complaint; and the same applies to the word "tow." The words "tug" and "tow" may be mentioned in a contract. Standing alone, they have no value as a pleading. The only thing that has any value in a

pleading is the contract. The contract is a fact that must be proven. Without a contract, expressed or implied, there can be no libel or complaint and no cause of action.

On these matters, the "libel and complaint" give no information. If the pleader had any idea on the subject, he incorrectly concluded by calling the "White City" a tug (which he knew was only a pleasure boat, called in an emergency, p. 80, fol. 238; p. 82, fol. 244; p. 96, fol. 287) and stating that it received the "Drifter" in good condition (p. 4, fol. 11) and delivered it in damaged condition (p. 5, fol. 14) is not a good complaint. If these words can be construed as stating a cause of action of any character, the most that can be said is, that it is a towage contract, simpliciter, and it has been so held by the United States Circuit Court of Appeals (48 F. [2d] 557) in this action where it cites direct and controlling decisions from the United States Supreme Court (*The Webb,* 14 Wall. 406, 20 L. Ed. 774; *Eastern Transportation Line* v. *Hope,* 95 U. S. 297, 24 L. Ed. 447).

Additional incorrect statements in the "petition and Brief for Writ of Certiorari."

In the "Subject Index" to petitioner's brief, under Point I, there it is stated:

> "Particularly where the tow is manned only by a servant or bargee who is not present during the period when the damage to the tow takes place."

The bargee represented by Captain Weston was present and directed the towing until he abandoned the tow on the night of Oct. 19, 1925. Abandonment is negligence.

There is no proof in the case as to when, or where or how, the "Drifter" was damaged except that given by petitioner's witness, Patrick S. Jolly, a marine surveyor, who at page 149, where the damage was under consideration:

"Q. Well, suppose we try to solve the mystery?

A. I don't know just what you are trying to get at.

Q. Have you any idea what could have caused that? (fol. 446).

A. I would say it was caused by either a drift log or bumping up against the dock or something—looked to me like it was done by a log or piling of some sort."

At page 147 (same witness) folio 439, referring to the point of damage to the "Drifter," he describes it as follows:

"Q. It was not a hole?

A. It was not what I call a hole, no."

At page 143, folio 429, he makes the same statement. Page 144, folio 430:

"Q. Describe this indentation you speak of. Was it round or oblong or what was its form?

A. Its formation, as I remember it, was what you call round."

At page 143, folio 429:

"Q. Describe the part you say was broken?

A. Why, her hull plating was broken on the starboard side amidships just above the water line—or at the water line."

Page 376, folios 88-89, William A. Rhodes testifying:

"A. The damage appears to have been done through impact."

"With some object—some floating object."

The damage to the "Drifter" was about an inch above the water line (p. 377, fol. 93).

The testimony of the petitioner's witness Jolly, the marine surveyor, taken in connection with that of Herbert N. Simpson, Alexander Simpson and William A. Rhodes, remove all doubt as to the most probable cause of the damage to the "Drifter" at the water line. As appears from the above, the indentation was round. Logs are usually round. The damage was at the water line. The log must have been submerged in whole or in part depending upon the action of the wind, the waves and tides (pp. 94-95). The entire course of the tow was through tide water. There was no protection placed on or around the "Drifter" by the Consolidated Shipbuilding Corporation to protect it from the ever present drift-wood and other causes of danger that infest these navigable waters. The "Drifter" with its thin shell (½ inch) was not made to be operated in such rough and dangerous waters.

At page 8 of petitioner's brief (top line) it is stated:

> "During the night it (the "Drifter") was not guarded by any watchman."

This is incorrect; it was guarded by two watchmen, Herbert N. Simpson and William A. Rhodes who stayed on the "White City" about ten or fifteen feet from the "Drifter" (p. 88, fols. 262 to 264).

It should be here stated, that the testimony of the witness Roos above quoted, showed that the Consolidated Shipbuilding Corporation placed its own Captain, Captain Weston, on the "Drifter" to remain on it until it was delivered at Port Newark. He abandoned it about 7:30 on the night of October 19th, 1925.

The "Drifter" was moored *"inside in smooth water and big, round rubber tires, fenders, to fend her off from the dock, so that she wouldn't bang or scratch or hurt herself"* (p. 88 fol. 262).

Therefore, the maximum precaution was taken by the owners of the "White City" although there is nothing in the contract that called for any act they did.

No harm came to the "Drifter" at that time or place.

At page 12 of petitioner's brief, reference is made to Captain Weston who is there described as "a colored laborer, *and employee of the Consolidated Shipbuilding Corporation* which built the 'Drifter.' Whether he was a 'laborer' or 'colored' does not change the fact that he was *'an employee of the Consolidated Shipbuilding Corporation'* and placed in charge of the towing by it." It must stand by its own act.

This "colored" man and "laborer" however, is correctly described by Mr. Roos who was present when the towing was arranged and started. At page 62, folios 184-185, he says:

> "He (Captain Weston) worked for Tom Turner. He had been a captain on boats and engineer. I had known him for many years before this. He was competent to perform his duties.
>
> Q. Was he in charge of the 'Drifter'?
>
> A. Yes, sir."

At the fourth paragraph of petitioner's brief, page 12, his attorney seeks to excuse the abandonment of the "Drifter" by Captain Weston and the towing, by intimating that Mr. Rhodes of the "White City" consented to the departure of Captain Weston before the trip was finished. There is no such testimony. The testimony is to the contrary. At page 90, folio 268:

> "Q. What time did Weston leave the tow?
>
> A. On the 19th, the night before, around 7 or 7:30, *after he had the boat tied up alongside of the pier.* He said, *'I'm not going to stay around here all night.'* ".

Page 104, folio 310:

> "Q. Were you present at the time Mr. Rhodes spoke to Mr. Weston about leaving, that he could go home that night?

A. He wasn't told he could go home, no, sir. He said he was going home."

Captain Weston was called as a witness at the trial in the State Court (p. 90, fol. 268) *by the petitioner. At the close of that trial, the petitioner lost his action against the owners of the "White City."*

The petitioner did not call Captain Weston as a witness in the trial in the United States District Court where Judge Woolsey asked the petitioner's counsel this question:

"The Court: What has become of Mr. Weston?
Mr. Freehill: He has left the employ of the Consolidated and we can't find him."

Mr. Freehill did not state what, if any, effort was made to find Captain Weston; he did not state that he issued a subpoena for him.

It might be here stated, that boat captains can be easily found in New York City.

At page 13 of petitioner's brief, reference is made to pages 27, 28, (Supp. Vol.) and that reference is followed by the statement, the "master" of the "White City" consented to the departure of Captain Weston. There is no reference whatever to this point on page 27 (also p. 373). At page 28 (also 374) folios 82-83:

"Captain Weston asked to be excused. I didn't see any reason why he should stay. As far as I was concerned, I didn't see any reason either why he should stay. It wasn't my business to know any reason."

Mr. Rhodes had no control over Captain Weston. Captain Weston, as the quoted testimony shows, was an employee in charge of the towing and manned the "Drifter."

The testimony of the cashier, Mr. Bolen, of the Shipbuilding Corporation is quoted above; he stated that Cap-

tain Weston left with the "White City" and the "Drifter" on October 19th, 1925, to go to Port Newark, to make delivery of the "Drifter" and that the reason he went was "they didn't have sufficient help on the boat to take care of it" (pp. 285-286):

The counsel for the petitioner seemed to think it was important to have it appear that Mr. Rhodes of the "White City" consented to the abandonmentof the towing by Captain Weston of the Consolidated Shipbuilding Corporation, although Mr. Rhodes had no control in the premises.

Mr. Freehill's long effort in this direction ends at page 393, folios 140-141:

> "Q. Then you sent him home, didn't you?
> A. I did not.
> Q. You just told him to go?
> A. If he wished."

At page 7, of petitioner's brief (3rd paragraph), it is stated that it was conceded that the "Drifter" was in good condition and it cites pages 71, 78. At page 71, the petitioner's own witness, Albert Bauer, testifies; he certainly could make no concession on behalf of the "White City." Besides he expressly testifies at that page at folio 212, in answer to the attorney for the petitioner:

> "Q. Were you present on the morning of October 19th, 1925, when the "White City" took the "Drifter" in tow at Morris Dock?
> A. No."

The only testimony at page 78 relating to the condition of the "Drifter" on said October 19th, 1925, is as follows:

> "Q. At that time the "Drifter" was in good condition, was she not?
> A. As far as I could see. I could not see anything wrong with her. I wasn't close enough to her."

It is repugnant to the English language to deduce a concession out of this testimony.

As appears from the foregoing, the petitioner at various times since this litigation was started on March 27th, 1926, (p. 27, fol. 81) has been constantly engaged in taking conflicting positions, all based on the contract contained in the letter from the Consolidated Shipbuilding Corporation, dated October 13th, 1925 (pp. 297-298).

1. His first complaint was against Alexander Simpson as sole defendant, on contract;

2. Then he brought into the action, the owners of the "White City" on a complaint in negligence (pp. 30-32);

3. On reaching the United States District Court, he stated to Judge Woolsey that the action against the owners in the State Court, was on contract (p. 46, fol. 138);

4. At page 40 in opening his case in the United States District Court, he states it is an action against the "White City" in rem for negligent towage;

5. In his petition of writ of certiorari, page 1, paragraph III, he says this action is brought for a "breach of contract of towage";

6. Now he seeks to transmute his ever changing complaint to one in bailment.

Having wholly failed in the courts he has been in, the petitioner now seeks to "bridge the chasm" by a "presumption" of negligence under an imaginary libel and complaint in bailment.

The petitioner, at last, recognizes that there is not one word in the record showing or tending to show any negligence on the part of the "White City."

The evidence offered on behalf of the petitioner forever precluded him from raising any question of negligence on the part of the "White City."

Page 394, folio 143:

"By Mr. Freehill:

"Q. Did you make this statement:

'We made the lines fast on the launch and the tow boat thoroughly supervised a proper mooring for the night.' * * *

A. I did" (Mr. Rhodes testifying).

POINT I.

The petitioner is asking the Court to change the doctrine of *stare decisis*.

The United States Circuit Court of Appeals in its decision and opinion in this case, has followed the law as settled in the United States Supreme Court.

In 48 F. (2d) 557, the United States Circuit Court of Appeals held in this action (The "White City") as follows:

> *"There is no doubt that a towage contract, simpliciter, does not put the tow in bail to the tug."*

This holding is based on:

> *The Webb,* 14 Wall. 406; 20 L. Ed. 774;
> *Eastern Transportation Line* v. *Hope,* 95 U. S. 297; 24 L. Ed. 478.

These cases cite many other authorities and are widely cited themselves.

The Steamer Webb, 14 Wall. 413-414, the Court in its opinion states:

"The libel filed in this case against the steamer, to recover the damages sustained by the ship in consequence of the alleged careless and unskilful towage, and the first question is whether the towage was either unskilful or negligent.

It must be conceded that an engagement to tow does not impose either an obligation to insure, or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negligence or unskilfulness to his injury in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services. But there may be damages in which the result is a safe criterion by which to judge of the character of the act which has caused it."

In the case at bar "the character of the act" in and of itself furnishes a "safe criterion" by which to judge the act. This is supplemented by the testimony of the witnesses Jolly, Alexander Simpson, William A. Rhodes and Herbert N. Simpson, herein quoted. There is no conflict in their testimony and as we view it, it points unerringly to the perils of the sea as the cause of the damage to the "Drifter." How the "White City" could be in possession of the "Drifter," especially that part of it at and below the water-line and in direct contact with the water with Captain Weston in charge of the "Drifter," with the "White City" forty feet away, is beyond our understanding, and none of the many authorities we have examined and quoted, has gone far enough to give us any help in that direction. This brings this branch of the case so far

as attempting to hold the "White City" is concerned into the realms of conjecture, and under the authorities, this is not permitted.

Liability ends where conjecture begins.

If the perils of the sea did not cause the damage, what did cause it? There is no answer to this in the record.

Transportation Line v. *Hope,* 95 U. S. 299-300, the Court held:

> "While it was very well to ask a charge that the transporter of the boat was not a bailee, and perhaps that the boat was not within his exclusive control, and that only ordinary care and diligence were required on his part, it was quite incorrect to ask a charge that the boat was within the possession and the exclusive care and control of her owner.
>
> The transportation company did not occupy the position of a common carrier, and did not have that exclusive control of the barge which that relation would imply. It did not employ or pay the master and the men in charge of her, nor did it exercise that internal control of her cargo, its storage, its protection, and the like, which belonged to a bailee, and it was not bound to the extraordinary duties and liabilities of a common carrier. *Alexander* v. *Greene,* 3 Hill (N. Y.) 9."

The "White City" was manned by its owners and the "Drifter" and cradle were manned by their owners.

Transportation Line v. *Hope,* 95 U. S. 297, states as follows:

> "Although a transportation company, engaged in towing the barge from one point to another, does not occupy the position of a common carrier, nor have that

> exclusive control of her which that relation would imply, it does have control of her to such extent as is necessary to enable it to fulfill its contract, and is, therefore, bound to exercise such degree of diligence and care as a skillful performance of the stipulated service requires."

The "White City" fulfilled this duty when on seeing the "Suscalanco" going to sea tied up at Fisher's Dock and reported the fact and 'phoned and received further orders. As appears from the evidence; Captain Weston joined in this precaution.

The Winnie (Circuit Court of Appeals, Second Circuit, December 4, 1906), 149 Fed. Rep. 725, holds:

> "A tug is not liable merely because a tow was injured while in its custody, but in an action against it to recover for the injury, the burden rests upon the libellant to affirmatively prove negligence or fault, which cannot be presumed merely because the injury is not otherwise accounted for."

As before stated, the petitioner has not and does not on the application point out any fault or negligence on the part of the "White City."

The Winnie, 149 Fed. Rep. 726-727, states as follows:

> "The burden was on the libellant to prove fault on the part of the tug; in this he failed. The testimony preponderates overwhelmingly in favor of the claimant to the effect that the tow was made up in the usual way. This being so we cannot escape the conclusion that liability cannot be predicated of a finding that the tow was made up in an unusual way. The libellant alleged negligence and failed to prove it. It was then the duty of the court to dismiss the libel."

"It is not at all unlikely that the damage was caused by the swells of passing ferry boats, but the Court is not called upon to enter the realms of conjecture in an attempt to ascertain how the accident was caused. It is enough for the present case that the tug did not cause it. There was nothing in the condition of the wind, or water to make towing unusually hazardous. The master, according to the great preponderance of proof, exercised the reasonable care, caution and maritime skill required. The tug was not an insurer, and *cannot be held liable merely because the Fermoil received an injury while in her custody.*"

"The case is easily distinguishable from *The Gennessee,* 138 Fed. 549, 70 C. C. A. 673, where the make up of the tow was such as to invite disaster while the flotilla was lying to during a storm and the tug made no effort to mitigate the risks due to an unusually perilous situation."

The Clarence L. Blakeslee (Circuit Court of Appeals, Second Circuit, May 8, 1917), 243 Fed. Rep. 366, states:

"The rules regarding litigation such as this have been plainly and repeatedly stated by this Court:

1. "The mere fact that a tow receives injury does not render the tug liable; libellant must affirmatively prove negligence, which is not presumed merely because the injury is not otherwise accounted for. *The Winnie,* 149 Fed. 725, 79 C. C. A. 431."

2. "The tug is not an insurer, and is not responsible for a master's error of judgment. *The W. E. Gladwish,* 196 Fed. 490, 116 C. C. A. 185."

3. "Navigators are not to be charged with negligence, unless they make a decision which nautical experience and good seamanship would condemn as unjustifiable at the time and under the circum-

stances shown. *The Nannie Lamberton,* 85 Fed. 983, 29 C. C. A. 519."

4. "The line of demarcation between error of judgment and negligence is indicated in *The E. B. Conine,* 233 Fed. 987, 147 C. C. A. 661."

5. "*The Frederick R. Ives* (D. C.), 25 Fed. 447, shows facts quite like this case."

The Clarence L. Blakeslee, 243 Fed. Rep. 367, states:

"However this may be libellant cannot recover without affirmatively showing some act of negligence on the part of the tug, proximately resulting in injury to his boat. This has not been done, and the decree below is reversed, with costs in both courts."

United States v. *Port of Portland* (Circuit Court of Appeals, Ninth Circuit, August 4, 1924, rehearing denied September 2, 1924), 300 Fed. Rep. 727, states:

"The mere fact that the tow was injured raises no presumption of fault on the part of the tug. We find no ground upon which to hold that a cause of action exists against the owner of the tug."

The Atlantic City, 241 Fed. Rep. 64, holds:

"It is well settled that a tug, or other vessel acting as such, is not a common carrier. *The Margaret,* 94 U. S. 494, 24 L. Ed. 146. She is only bound to exercise reasonable care and skill in performing the service which she has undertaken. The facts, therefore, that an accident happens to the tow does not of itself give rise to any presumption of negligence on the part of the tug, and the burden of proof is upon the party seeking to charge the tug with liability. *The L. P. Dayton,* 120 U. S. 337, 351, 7 Sup. Ct. 568,

30 L. Ed. 669; *The J. P. Donaldson,* 167 U. S. 599, 603, 17 Sup. Ct. 951, 42 L. Ed. 292. The master of the vessel towed has control of the loading and is responsible therefor."

The Buttercup v. *United States,* 8 Fed. Rep. (2d) 282, also approves of the rules laid down in the *Blakeslee* case. *The Sea King,* 265 Fed. Rep. 418, holds as follows:

"Upon the evidence, I am not satisfied to the contrary. The evidence fails to establish how or where the accident occurred. No satisfactory conclusion can be reached on either point. The cause of the accident, whether submerged obstacle, sunken wreck, uncharted rock, or known shoal, remains entirely conjectural."

"The tug was not an insurer. The libellants, in order to recover, must prove that the injuries to the barge were caused by negligence on the tug's part *The R. B. Little,* 215 Fed. 87, 131 C. C. A. 395 (C. C. A. 2d Cir.); and that they have failed to do."

Dameron-White Co. v. *Angola Transfer Co.,* 19 F. (2d) 14, held:

"The tug is not responsible for accidents occurring through the unseaworthiness of the tow for the intended voyage, unless her unseaworthy condition is disclosed, or is so apparent that it would be negligent of the tug to attempt to proceed."

Southgate v. *Eastern Transp. Co.,* 21 F. (2d) 47, states:

"Vessel, seeking tow-boat's services, represents that it is seaworthy for voyage anticipated, and the tug may assume that it will carry competent and sufficient crew."

"Accident to tow does not raise presumption of negligence of tug, burden of proof thereof being on person asserting liability."

"Tug held not liable to barge, not properly manned and equipped, for losses from drifting and stranding after anchoring during storm."

Cleary Bros., Inc. v. *Port Reading R. Co.*, 29 F. (2d) 496, states:

"Libellant, seeking recovery against tug, has burden to prove respondent's negligence was proximate cause of damage."

"In libel proceeding against tug for damages to tow, libellant has burden of proof, and must show that respondent's negligence was not only one cause, but was the proximate cause of damage."

The Radnor, 21 F. (2d) 982, holds:

"Tug is not insurer; loss of tow raises no presumption of fault against tug."

"Towing tug is not insurer, but is only bound to exercise reasonable skill and care, and mere loss of tow raises no presumption of fault against the tug."

"A tow, sinking under normal conditions is presumed unseaworthy, unless mishandled."

The Sea Lion, 12 F. (2d) 124, states as follows:

"Owner of tow, to recover for its loss, must show that it was seaworthy for voyage contemplated at season in question."

The Bear, 11 F. (2d) 607, held:

"No recovery can be had of a tug for injury to its tow, merely because of taking it through floating ice, soft and broken by tugs."

"There is no presumption of negligence from injury to towing; but negligence, which was proximate cause, must be proved as pleaded."

POINT II.

The United States District Court rendered its decision under a libel not before the Court.

The decision and opinion of Justice Woolsey are printed at page 306 and at folios 919, 920, he there holds that the libel is based on contract as appears from the following:

> "The libel herein, *which sounds in contract,* alleges that the 'Drifter' and her cradle were delivered to the 'White City' in good condition at Morris Heights and were delivered by the 'White City' at Port Newark in a damaged condition."

There are four reasons why the Court could not so proceed and assume that the libel "sounded in contract" and make a decision as though such a libel, complaint or cause of action were before it:

1. Because of the law as settled by the United States Supreme Court;

2. Because the pleader who appeared for the petitioner defined his cause of action at the opening of the trial and elected to try and did try his case on a cause of action confined to an action against the "White City" in rem for *negligence* in towage (p. 40, fol. 120);

3. Because the uncontradicted evidence and the law showed there was no bailment;

4. A towage contract, simpliciter, does not place the tow in bail to the tug.

The John G. Stevens, 170 U. S. 125, holds as follows:

> "This Court more than once, has directly affirmed that a suit by the owner of a tow against her tug, to

recover for an injury to the tow by negligence on the part of the tug, is a suit *ex delicto* and not *ex contractu.*"

Mr. Freehill, trial attorney for the petitioner in the United States District Court, made it very clear, indeed, that this action in that Court was for *negligence* in towage.

In opening his case at page 40, folio 120, he stated to the Court:

"This action was brought against the 'White City' in rem for *negligence* towage."

At page 45, folio 135, Mr. Freehill explained that the action in the State Court (the Municipal Court) was on contract and "not for *negligent* towage." His idea was that a change in *"issues"* would avoid the defense of *res judicata.*

Mr. Freehill again makes it clear (p. 46, fol. 138) that the action was on contract in the Municipal Court and not negligence. Mr. Freehill was confronted with the plea of *res judicata* because of the identity of subject matter and person and complaint in the Municipal Court with that in the United States District Court. His idea was, that if he made it appear that his former action in the Municipal Court was on contract and that his libel was an action "in rem for *negligence* in towage," that he would have different *"issues."* At page 46, folio 137, this is made clear:

"Mr. Freehill: He must prove that the *issues* are identical with those here, and that the parties are the same."

Later in the trial in the United States District Court after the record in the Municipal Court was produced, Mr. Freehill admitted "identity of subject matter and parties" (p. 47, fol. 139).

He proceeded and tried his case in great detail, with many witnesses and exhibits to establish his libel *"in rem for negligence in towage."*

The petitioner, through his counsel, had the exclusive right to define his libel, complaint and cause of action, and having done that he had no alternative; he had to succeed or fail on his election. He chose to confine his libel to an action "in rem for *negligence*" and the District Judge had no power after the case was so tried to decide it under a different theory or libel because there was no different theory or libel before him.

Pope v. *Kelly,* 30 App. Div. 254, has passed on this point; it is there held:

> "The plaintiffs are entitled to maintain their theory, whether right or wrong, until the question is decided by demurrer or a trial."

O'Brien v. *Blunt,* 5 App. Div. 223, it is held:

> "That the order was improper in that the plaintiffs had been required to separate and separately state and number alleged different causes of action, *when their theory of the action was that the complaint stated but a single cause of action."*

Weed v. *The First National Bank,* 106 App. Div. 287-288, quotes the ruling in the *O'Brien* case (5 App Div. 223) and approves and follows it:

Varuch v. *Young,* 149 App. Div. 466-467, follows the rule above stated.

As appears from the foregoing the United States District Judge rendered his decision under a complaint that was not before him on evidence that did not sustain it or any other cause of action.

A similar situation arose in *People* v. *Dumar,* 106 N. Y. 508, where the Court held:

> "As to the act charged, there was no proof."

In the libel, the act charged was *"negligence"* as asserted by the petitioner's counsel, for which there was no proof. The decision was rendered under a libel *"sounding in contract"* which was not before the court.

The evidence before the court affirmatively showed that there was no *negligence* and no breach of a contract of bailment.

POINT III.

The tow "Drifter" was not in bail to the "White City."

What possible reason would the "White City" have to charter the yacht "Drifter" and its cradle? What would it do with the cradle?

The rights, duties and obligations of the Consolidated Shipbuilding Corporation and Alexander Simpson, the sole contracting parties to the contract, were fixed by the contract for the towage (pp. 297-298).

The "White City" was not a party to that contract.

This contract was changed before the date of towing; the work boat "Hilda" was disabled and out of repair.

By mutual consent the "White City" a small motor-boat used for passenger service and owned by two "boys" was substituted in the emergency and for that reason the towing did not start until 9 A. M., October 19th, 1925.

The best method of interpreting this contract is the one used by the parties to it. What did they do under it?

The Consolidated Shipbuilding Corporation consented to the substitution of the "White City" a passenger motor-boat, in place of the work boat "Hilda" that became disabled before the towing started. In fact it suggested it.

It consented to the change in the hour of starting.

It used its own ropes, hawsers, etc.

It arranged and started the tow.

It placed its own Captain Weston on the "Drifter" who directed the tow until he abandoned it at Fisher's Dock.

It fixed the course of the tow, its point of departure and destination.

It never parted with supervision of the towing.

It was in full possession of the towing of the "Drifter" and cradle and directed the "White City," the propelling power.

It received the tow at the point of destination. The "Drifter" and cradle were never out of its possession and control.

It sent the tow through dangerous waters against the advice of Alexander Simpson.

It knew the inherent perils of the sea.

It sent the "Drifter" through these dangerous waters whose exterior coverings was only a half inch thick without protecting its sides by placing it inside the crade to protect the "Drifter" from logs and float-wood. The cradle was built to contain the "Drifter" and protect it from exterior injury.

The motor-boat "White City" called into service in an emergency to furnish propelling power to another pleasure yacht to take it from one point to another, was not a conventional tow boat; that was evident from its appearance.

While the "boys" who owned the "White City" and manned it, received a small sum for their trouble, which was one-half of what a regular tug would have charged, their status was not that of a duly licensed tug boat. They did not seek the engagement; they made no representation that they operated a tug. Their license was a motor-boat license.

Their status was the same as a pleasure boat out on the waters finding another pleasure boat in distress, helps it to port.

Surely if one pleasure automobile finds another pleasure automobile in distress and tows it to the nearest garage, that act does not impose the duties of a truck on it, even

if it receives some small compensation by way of agreement or gratuity.

Such an act in a white man's country is considered an honorable and generous act and is never used or attempted to be used as a trap to separate the volunteer from his money.

There is no act inherently dishonorable and dishonest, that has ever received the approval of any American Court.

The act that the petitioner is trying to torture into a grievance, is unconscionable.

POINT IV.

In this application the petitioner again changes his position. He now seeks to sustain a judgment in the United States District Court granted on the theory of a "libel sounding in contract" by citing the rules confined to and peculiar to *negligence* which is *ex delicto*.

Under the title *"Subject Index,"* the petitioner states three points on which he bases his petition. The first point is not confined to this record as appears from the citations of the evidence from the record quoted in the foregoing statement of facts. The other two points revert back to the theory of negligence which the United States District Court did not follow in making its decision.

The petitioner's brief brings himself squarely within the authorities cited by respondents in their brief at Point I, which show that the petitioner has no just claim or grievance. The law specifically excludes each of them.

It was error for the United States District Court to hold (p. 310, fols. 928-929) that:

> "The owners of the 'White City' became bailee of the 'Drifter' and her cradle on their delivery to the 'White City' at Morris Heights"; and

"This principle has been repeatedly enforced in cases of bailment arising under *charter parties.*"

As appears in Respondents' Brief, Point I, the United States Circuit Court of Appeals (48 F. [2d] 557) following and quoting the authority of the decisions of the United States Supreme Court, held:

"There is no doubt that a towage contract, simpliciter, does not put the tow in bail to the tug."

The contract in the case at bar is not one

"Under charter parties."

This appears from the citations referred to in the decision and opinion in the United States District Court.

The term or contract called *"charter parties"* has, from the earliest times, had a clear and definite meaning and application. The most comprehensive definition with illustrations of this term is printed in Bouvier's Law Dictionary (1928). It is as follows:

"Charter party: A contract of affreightment, by which the owner of a ship or other vessel lets the whole or a part of her to a merchant or other person for the conveyance of goods, on a particular voyage, in consideration of the payment of freight."

The case at bar has no resemblance to *"Charter party."*

In the case at bar, the "White City" did not charter the "Drifter" or cradle. The contract in the case at bar (pp. 297-298) provided for a limited service to be rendered by which the "White City" was to furnish propelling power to the end that the Consolidated Shipbuilding Corporation could make delivery of the "Drifter" it built for T. C. Frost, from one point to another point; from its shipyard

at Morris Heights, New York, to Port Newark, New Jersey, to be there received by it and by it to be loaded on an outgoing ship for Texas. This company placed its own captain on the "Drifter" and in charge of the tow to stay there until it made delivery at Port Newark. In the course of the voyage, Captain Weston left the tow at Fisher's Dock, about five miles from Port Newark. This left the tow insufficiently manned. This was a wrongful act on the part of the tow; it amounted to abandonment on the part of the one-man crew on the "Drifter," put there by the Consolidated Shipbuilding Corporation.

The "White City" being in strange waters twenty or twenty-five miles from the starting point, and about five miles from the point of destination with night and darkness at hand, 'phoned for and received further orders given by the Consolidated Shipbuilding Corporation, and complied with them. The owners of the "White City" avoided the dangers of the night by mooring at Fisher's Dock as per changed orders and placing fenders on the "Drifter" and remaining on the "White City" moored ten or fifteen feet from the "Drifter" all of the night.

On the morning of October 20th, 1925, Herbert N. Simpson, one of the two crew on the "White City" took the place of Captain Weston on the "Drifter," which Captain Weston had abandoned the night before, and the tow as reorganized, waited for daylight and then proceeded to Port Newark where the tow was met by Mr. Bauer of the Consolidated Shipbuilding Corporation who received and took charge of it.

These facts cannot be transmuted into a *"charter party."*

They were when they developed and still are *"a towage contract, simpliciter, and did not put the tow in bail to the tug."*

POINT V.

The decision in the United States District Court was based on the following erroneous finding not within the terms of the contract:

> **"I believe (p. 309, fol. 927) the libellant's witnesses that the 'Drifter' and the cradle were damaged when they arrived, that a receipt was given to Rhodes one of the claimants here, now dead, reciting the damage, that he accepted this without protest, and that neither Rhodes nor Simpson could explain when, how or where the damage happened."**

This was error; it made the "White City" a bailee, insurer and common carrier.

There was no claim that the cradle was damaged and there is not a word of evidence to that effect. The only claim made was confined to the "Drifter."

The man who could, if anybody could, explain the damage to the "Drifter" was the person who manned it. That was Captain Weston placed in possession of the "Drifter" and cradle and directed the tow until he abandoned it. He was in the employment of and placed in charge by the Consolidated Shipbuilding Corporation.

The petitioner called Captain Weston as a witness in the State Court trial and lost his action there as against the owners of the "White City."

The petitioner did not call Captain Weston as a witness at the trial in the United States District Court.

Delaware Dredging Co. v. *Graham, The J. D. Graham,* 43 F. (2d) 852, was a charter party contract. In that case, the tow sank and the tug was unable to explain the cause

of the sinking. The owner was not on the tug. There, as in the case at bar, no negligence was shown against the tug.

In that case as here, the tug did not rest its case upon proof of delivery and failure to return, but produced testimony showing all the circumstances of loss. The libel was dismissed. The Court (43 F. [2d] 852), held as follows:

> "Where the bailor does not rest his case upon proof of delivery and failure to return, but produces evidence showing all circumstances of loss, his case fails unless bailee's negligence affirmatively appears from such proof."

In *Southern Ry.* v. *Prescott*, 240 U. S. 640 , holds as follows:

> "The railroad company was therefore liable only in case of negligence. The plaintiff, asserting neglect, had the burden of establishing it. The burden did not shift. As it is the duty of the warehousemen to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a *prima facie* case of negligence. *If, however, it appears that the loss is due to fire, that fact, in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff having the affirmative of the issue must go forward with the evidence.*"

"Cyc." Vol. 36, page 74, states the rule to be as follows:

> "Generally where a defect in a vessel develops without any apparent cause, it is presumed to have existed when the service began."

Work v. *Leathers*, 97 U. S. 379.

"Cyc.," Vol. 36, page 74, states:

"The burden of proving seaworthiness is on the owner."

Ames v. *Belden,* 17 Barb. 513, holds as follows:

"Contracts of bailment, when it is sought to enlarge the liability of the bailee, should not be expounded unfavorably to the bailee, beyond the *obvious scope of the terms of the agreement.* Therefore, a covenant to insure should never be implied; a covenant of that nature not appertaining to contracts of bailment."

"By a clause in a charter party, binding the charterer to return the boats at a given period in as good condition as they now are, with the exception of the ordinary use and wear, the charter does not undertake to become an insurer against the perils of the sea, or risks of navigation." To the same effect is *Hyland* v. *Paul,* 33 Barb. 241.

State v. *Meagher,* 44 Mo. 356, holds as follows:

"The care to be exercised by a bailee over property in his charge *must be graduated according to the character of the property,* its value and the convenience of its being made secure."

Work v. *Leathers,* 97 U. S. 379, holds:

"A defect in the vessel which is developed without any apparent cause is presumed to have existed when the service began."

The same case at page 380, continues:

"Where the owner of a vessel charters her, or offers her for freight, he is bound to see that she is seaworthy

and suitable for the service in which she is to be employed. If there be defects known, or not known, he is not excused. He is obliged to keep her in proper repair, unless prevented by perils of the sea or unavoidable accident. Such is the implied contract where the contrary does not appear. * * * If a defect without any apparent cause be developed, it is to be presumed it existed when the service began." (*Talcot* v. *Commercial Insurance Co.*, 2 Johns. N. Y. 124.)

Young v. *Leary*, 135 N. Y. 576, part of the opinion is as follows:

"The contract in this case comes as it seems to us under another class which relates to the hiring for use of the thing hired and where an express contract is made to redeliver the article hired upon the determination of the term of hiring. Even in such cases of express contract, there is implied a condition of the continued existence of the thing which is the subject of the contract, and if it perish without any fault of the hirer, so that redelivery becomes impossible, the hirer is excused. If a horse be delivered to one under an express promise to redeliver when demanded, and the horse die before demand and without fault on the part of the bailee, he is excused."

POINT VI.

The petitioner's motions in the United States Circuit Court of Appeals for re-argument and for certification of questions of law (p. 419) were denied (p. 441).

The decision in the United States Circuit Court of Appeals was handed down April 6th, 1931 (p. 413). Its order directing that a mandate issue was dated April 13th, 1931 (p. 418).

The mandate is dated April 24th, 1931.

Judgment of reversal under the mandate was entered in the United States District Court on May 9th, 1931. Neither this judgment nor the mandate is printed in the Transcript of Record.

POINT VII.

Wherefore, respondents respectfully ask for an order denying the petitioner's application for a writ of certiorari with costs and disbursements.

Dated, New York, August 14th, 1931.

Respectfully submitted,

FLORENCE J. SULLIVAN,
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FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 217.

WILLIAM STEVENS,

Petitioner,

vs.

THE VESSEL WHITE CITY, HER ENGINES, ETC.,

Respondent.

BRIEF FOR RESPONDENT

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SUPREME COURT OF THE UNITED STATES

WILLIAM STEVENS,
Petitioner,
vs.
The vessel WHITE CITY, her engines, etc.,
Respondent.

No. 217
October Term
1931

BRIEF FOR RESPONDENT

This is a writ of certiorari to review a decision of the Circuit Court of Appeals for the Second Circuit reversing a decision of the District Court for the Southern District of New York (Woolsey, *J.*).

The cause of action arose out of unexplained damage to the *Drifter,* a 45 foot motor yacht, while in tow of the excursion boat *White City* from Morris Heights, New York, to Port Newark in Newark Bay, New Jersey. The damage consisted of an indentation in the yacht's starboard side, amidships, at the water line, 6-10 inches in diameter (R. 68-9, 71, 55, 76).

The libel was filed by an assignee of the owner of the *Drifter* against the *White City,* following an unsuccessful action on the same cause of action in the Municipal Court of the City of New York (R. 90, 230-1).

FACTS.

The owner of the yacht *Drifter** contracted with one Alexander Simpson for the towage of the yacht and her cradle from the builder's yard at Morris Heights, New York, to alongside the *Suscalanco,* the steamer on which she was to be shipped, at Port Newark. Simpson engaged the excursion boat *White City,*† to do the towing. On the morning of October 19, 1925, the *White City,* in charge of a crew of three, including her master, took the *Drifter* and her cradle in tandem tow at Morris Heights, the yacht directly astern and the cradle astern of the yacht, both on 40 foot hawsers (R. 45-6, 53, 60-2). The yacht was manned by a "boatman" or "bargee", Weston, who was placed aboard by the builders, representing the owner, to remain in charge "until the boat arrived at the steamer and the steamship company took hold of it". His duties were those of an ordinary bargee and included that of steering the tow (R. 42-3, 71, 75).

The tug and her tow proceeded down the Harlem and East Rivers, through the Bay and the Kills to Newark Bay. Off Hell Gate the cradle broke loose, and the tug was obliged to stop and manoeuver to pick her up again. She then continued on her voyage and while proceeding through the Kills off Bayonne, New Jersey, about 3.30 P. M., the steamer *Suscalanco,* on which the tow and her cradle were to be shipped, was met and passed bound to sea. The tugmaster decided to go ashore and telephone for instructions, and accordingly put into Fisher's Dock, Bayonne. Having been informed that the tow would be shipped by a later steamer, he decided to spend the night at Bayonne and

* Also referred to in this brief as the "tow."

† Also referred to in this brief as the "tug."

to proceed to Port Newark in the morning (R. 62-3, 75). Tug and tow were therefore tied up at Fisher's Dock, Bayonne, inside in "smooth" water and fenders put over the yacht's side to keep her clear of the dock (R. 64). The bargee, Weston, not wishing to stay aboard, announced that he would leave, to which the tugmaster did not object, and he accordingly left (R. 65, 304).

The following morning the tug and tow continued on to Port Newark. As the bargee had not returned, the tow was steered by a deckhand from the tug. Upon arrival at destination an indentation 6-10 inches in diameter was found on the yacht's starboard side amidships at the waterline (R. 55, 68, 76).

It was suggested at the trial that a submerged object or piece of driftwood might have caused the damage (R. 69-70). However, neither petitioner's nor respondent's witnesses could explain just how the damage occurred (R. 229).

At the trial respondent produced the deckhand of the tug, and offered in evidence the testimony of Rhodes, the tugmaster, and Simpson, who engaged her, given in the Municipal Court action, both men having died in the interim (R. 70); but on objection of petitioner, whose present counsel had cross-examined both witnesses in the Municipal Court, this testimony was excluded. Petitioner failed to produce the bargee Weston (R. 70, 7-8).

Decisions Below

The District Court held that the contract of towage constituted a bailment, and that a presumption of negligence arose by reason of the tow arriving at destination in damaged

condition and that unless the tug could *explain* the damage, she was liable (R. 232).

The Circuit Court of Appeals, in reversing the decision of the District Court and dismissing the libel, held that the tug was not a bailee and that no presumption of negligence arose from the mere injury to the tow, and that the burden of proving negligence rested upon the libellant (R. 304-8).

The District Court decision is reported at 35 Fed. 2nd 1006, 1929 A. M. C. 1628 (Summary) and that of the Circuit Court of Appeals at 48 Fed. 2nd 557, 1931 A. M. C. 844.

Summary of Argument

We shall argue that

1. The towage contract did not constitute a bailment and no presumption of negligence arose from the unexplained injury to the tow; and

2. Even had the tug been a bailee, any presumption arising from the delivery of the tow in damaged condition was rebutted by the proofs.

POINTS

I. THE TOWAGE CONTRACT DID NOT GIVE RISE TO A BAILMENT AND NO PRESUMPTION OF NEGLIGENCE AROSE BECAUSE THE TOW SUSTAINED DAMAGE.

It has long been established by this Court that a tug not holding herself out as a common carrier and engaged in a simple contract of towage, is not a bailee, and that no presumption of fault against the tug arises from the mere fact of damage to the tow. The towage contract requires only that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services.

In *Transportation Line* v. *Hope,* 95 U. S. 297, plaintiff sought to recover for the loss of a barge which the defendant had undertaken to tow from Jersey City to New Haven. The barge sank before reaching her destination. This Court said:

"While it was very well to ask a charge that the transporter of the boat was *not a bailee,* and perhaps that the boat was not within his exclusive control, and that only ordinary care and diligence were required on his part, it was quite incorrect to ask a charge that the boat was within the possession and the exclusive care and control of her owner.

"The transportation compa v did not occupy the position of a common carrier, and did not have that exclusive control of the barge which that relation would imply. It did not employ or pay the master and the men in charge of her, nor did it exercise that internal control of her cargo, its storage, its protection, and the like, which belonged to a bailee, and it was not bound to the extraordinary duties and liabilities of a common carrier. *Alexander* v. *Greene,* 3 Hill (N. Y.), 9" (pp. 299-300). (Italics ours.)

In *The Steamer Webb,* 14 Wall. 406, this Court said:

"It must be conceded that an engagement to tow does not impose either an obligation to insure, or the liability of

common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negligence, or unskilfulness to his injury in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services" (p. 414).

In *The L. P. Dayton,* 120 U. S. 337, the tow of one tug collided with the tow of another tug. This court again laid down the rule that no presumption arose from the mere fact of damage to the tow, saying:

"In favor of the injured tow, the libellant in this case, there is no presumption of fault as against either, nor against both jointly. There is no presumption against the *Bowen,* for the reason we have already stated; there is none against the *Dayton,* because on her behalf all the alleged negligence is denied, and the contrary allegations of the libel cannot be legally maintained merely by corresponding allegations in the answer of the *Bowen.* To hold otherwise would require that in every case, as between the tow and its tug, the latter should be required affirmatively to establish its defense against the presumption of its negligence. There is no ground, in reason or authority, for making such an exception to the general rule, which requires the plaintiff, in the first instance, to establish by proof the allegations of its complaint. It does not tend to establish such an exception that it appears by the record that one or the other of the respondents must have been so in fault as to be liable for the consequences. It still remains that there is a controversy as to which of the two is guilty, and no decree can pass without affirming the liability of one or both. That affirmation must stand upon proof, unless it appears on the record which one of the two is at fault, or that both are" (pp. 351-2).

See also *The J. P. Donaldson,* 167 U. S. 599.

The above rule has been repeatedly followed in the various circuits. We shall set forth the cases below grouped by circuit.

SECOND CIRCUIT

Hildebrandt v. *Flower Lighterage Co.*, 277 Fed. 436 (affirmed 277 Fed. 438):

"In my judgment, that burden has not been met; there has been no showing of negligence. It may be that the boat was badly shifted by the tug. It may be that the damage was done in the shifting; but there is no proof of that, and while, of course, the tug is not liable, in the absence of proof that the damage occurred because of faulty shifting, in my judgment the respondent is not liable for the fault of shifting, if there was fault of shifting, on the part of the tug" (p. 437).

The Greenwich, 270 Fed. 42 (C. C. A.):

"The burden was upon the libelant to prove fault on the part of the tug. This it has not done. The claim of negligence has failed of proof. The tug was not an insurer, and so the mere sinking while in her custody does not establish the case. *The Winnie*, 149 Fed. 725, 79 C. C. A. 431; *Aldrich* v. *Penn. R. R. Co.*, 255 Fed. 330, 166 C. C. A. 500" (p. 44).

Aldrich v. *Pennsylvania R. Co.*, 255 Fed. 330 (C. C. A.):

"The burden is on the one who asserts negligence to prove it, and the mere fact that a barge has been damaged while in tow does not raise the presumption that the tug has been at fault. *The Winnie*, 149 Fed. 725, 79 C. C. A. 431; *The R. B. Little*, 215 Fed. 87, 131 C. C. A. 395.

* * * * * * *

"No one seems to know, nor, indeed, do appellant's witnesses pretend to know, how this damage was caused. In the absence of some proof showing that the tug caused it, negligence cannot be presumed" (p. 331).

The Clarence L. Blakeslee, 243 Fed. 365 (C. C. A.):

"The mere fact that a tow receives injury does not render the tug liable; libellant must affirmatively prove negligence, which is not presumed merely because the injury is not otherwise accounted for. *The Winnie*, 149 Fed. 725, 79 C. C. A. 431" (p. 366).

The R. B. Little, 215 Fed. 87 (C. C. A.):

"It seems to us that the burden is on the libellant to show some negligence on the part of the tug and that until this is done, the burden of proof does not shift. There is nothing in the testimony here to show that the tug was guilty of fault. It is all left to guesswork and speculation. The argument is that the barge was injured at some time, probably while being towed by the tug, *ergo* the tug is liable. In other words the tug may be held liable for an injury which she did not cause or aid in causing. No one knows or pretends to know how this injury was caused and until some proof is produced that the tug caused it, it seems to us she should not be held liable" (p. 88).

The Winnie, 149 Fed. 725 (C. C. A.):

"The burden was on the libellant to prove fault on the part of the tug; in this he failed. * * * The libelant alleged negligence and failed to prove it. It was then the duty of the court to dismiss the libel. * * * The tug was not an insurer, and cannot be held liable merely because the *Fermoil* received an injury while in her custody" (pp. 726-7).

See also:

The W. H. Baldwin, 271 Fed. 411, 413 (C. C. A.);

THIRD CIRCUIT

Delaware Dredging Co. v. *Graham,* 43 F. (2d) 852 (E. D. Penn.).

FOURTH CIRCUIT

Southgate v. *Eastern Transp. Co.,* 21 Fed. (2d) 47 (C. C. A.):

"The happening of an accident to a tow does not of itself raise any presumption of negligence on the part of the tug; and the burden of proof is upon the party seeking to charge the tug with liability therefor. The towage contract requires no more than that one who undertakes the service shall carry out his undertaking with the degree of caution and skill which prudent navigators usually employ in similar services" (p. 49).

The Atlantic City, 241 Fed. 62 (C. C. A.):

"It is well settled that a tug, or other vessel acting as such, is not a common carrier. *The Margaret,* 94 U. S. 494, 24 L. Ed. 146. She is only bound to exercise reasonable care and skill in performing the service which she has undertaken. The fact, therefore, that an accident happens to the tow does not of itself give rise to any presumption of negligence on the part of the tug, and the burden of proof is upon the party seeking to charge the tug with liability" (p. 64).

The Ashwaubemie, 3 F. (2d) 782 (C. C. A.):

"The question turns almost entirely upon the facts, and there is but little dispute about the law. As contended for by the libelant, the mere fact that a tow receives injury does not render the tug liable. Negligence must be affirmatively shown. The tug is not an insurer of the safety of the tow, nor responsible for errors of judgment on the part of the master, if a competent seaman, exercising due care. Negligence is not presumed from the mere happening of an accident, and the burden of proof of negligence rests upon those seeking to establish the tug's liability therefor. *The Atlantic City* (C. C. A. 4th Cir.) 241 F. 62, 154 C. C. A. 62; *The Clarence L. Blakeslee,* 243 F. 365, 156 C. C. A. 145; *The W. H. Baldwin* (C. C. A.) 271 F. 411" (p. 783).

FIFTH CIRCUIT

El Rio, 162 Fed. 567 (D. C. S. D. Alabama);

Wilson v. *Sibley,* 36 Fed. 379 (D. C. S. D. Alabama);

The Pacific Maru, 8 Fed. (2d) 166 (D. C. S. D. Georgia E. D.);

The Buttercup, 8 Fed. (2d) 281 (D. C. E. D. Louisiana.

SIXTH CIRCUIT

The Kunkle Bros., 211 Fed. 540 at 543 (D. C. N. D. Ohio E. D.).

SEVENTH CIRCUIT

The W. H. Simpson, 80 Fed. 153 (C. C. A.):

"There is here no presumption of negligence arising from the fact of the disaster, and the burden of proof is put upon the libelant to satisfy the court upon the evidence presented and upon the reasonable probabilities of the case that the tug was guilty of the fault charged through failure to exercise ordinary skill and care" (pp. 154-5).

NINTH CIRCUIT

Pedersen v. *Spreckles,* 27 Fed. 938, 944-5 (C. C. A.):

"The general rule as to the duty and liability of a tug in towing is clearly expressed in *The Webb,* 14 Wall. 406, 414.
* * *

"The law applicable to this case is that both the tug and the tow must exercise reasonable care and skill. While the tug was bound to exercise reasonable care and skill, she had the right to expect corresponding care and skill on the part of the schooner. *The Jacob Brandow,* 39 Fed. 831; *The Sagua* v. *The Grace,* 42 Fed. 461; *The Ciampa Emilia,* 46 Fed. 866, 868; *The Invertrossachs,* 8 C. C. A. 87, 59 Fed. 194, 198; *The Margaret,* 5 Biss. 353, Fed. Cas. No. 9,068; *The Allegiance,* 6 Sawy. 68, Fed. Cas. No. 207; *Sproul* v. *Hemmingway,* 14 Pick. 1. The contention of appellant that the happening of the accident raised a presumption of negligence on the part of the tug cannot, therefore, be sustained. The burden of proof in this case was upon the appellant to show affirmatively, by a clear preponderance of the evidence, that the tug was guilty of negligence" (pp. 944-5).

The A. R. Robinson, 57 Fed. 667 (D. C. D. Washington, N. D.);

The Sea Lion, 12 Fed. (2d) 124 (D. C. N. D. California, S. D.).

The cases relied upon by petitioner are either not in point or are not authoritative.

In *McWilliams Bros. Inc.* v. *Director-General,* 271 Fed. 931 (Brief, p. 11), negligence was proved against the tug, and reference to the tug as "merely a bailee for hire" was *dicta contra* to numerous decisions in the same Circuit (2nd) before and since (see decision below R. 305-8).

The reference to Hughes on Admiralty, 2nd Edition, page 129, that a tug is "only an ordinary bailee liable for ordinary negligence" (Brief, p. 11) is misleading. Petitioner should have added the sentence immediately following, which reads:

"It is also settled that the occurrence of an accident raises no presumption against the tug, and that the burden is on the complaining party to prove a lack of ordinary care."

In re Pennsylvania R. R. Co. (*Brinton and Drifting Barges*) 48 F. (2d) 559; 1931 A. M. C. 852 (Brief, p. 11), was not a case of towage but a bailment to a railroad company, because of certain loading and wharfage provisions connected with the particular form of contract. The opinion was written by Learned Hand, *J.*, who wrote the decision below in the instant case.

The Princeton, 19 Fed. Cases 11433a (Brief, p. 16), was a decision of the District Court for the Southern District of New York in 1851 before the decision of this Court in *The Webb* in 1871 (14 Wall. 406).

Bust v. *Cornell,* 24 Fed. 188 (Brief, p. 16), a decision of the old Circuit Court in New York in 1885, is overruled by the later decisions in the Second Circuit.

D. Newcomb, 16 Fed. 274 (Brief, p. 16), a decision in the Western District of Pennsylvania in 1883, the question of burden of proof was not involved because the negligence of the tug was proved.

Sturgis v. *Boyer,* 65 U. S. 110 (Brief, p. 16), is not in point. It involved the question of responsibility of "navigation" as between tug and tow.

Petitioner's references (Brief, pp. 16, 28-9) to the *Delaware,* 43 F. (2d) 852 (*Delaware Dredging Co.* v. *Graham*) are rather misleading, for the Court there held that the burden of proof was on libelant and as no evidence of negligence was produced, dismissed the libel.

The Genesee, 139 Fed. 549 (Brief, p. 17), was referred to in the decision below as

"inconclusive as to the absence of a presumption arising from injury alone. The decision depended upon an inference from the evidence" (R. 416).

The Seven Sons, 29 Fed. 543 (Brief, p. 18), a decision in the District Court for the Western District of Pennsylvania in 1885 referred to in the Court below (R. 307) does not appear to be authoritative now in the 3rd Circuit and is overruled by the decisions of this Court.

Newport News Shipbuilding and Dry Dock Company v. *United States,* 34 Fed. (2d) 100 (Brief, p. 17), had nothing to do with towage. It involved a bailment under a repair contract.

Petitioner complains that

"It is a harsh rule which obligates the owners of a boat such as the *Drifter,* to specifically point out overt acts of negligence on the part of a tugboat which undertakes a contract of towage where the circumstances of damage are not explained, and which are unknown to the owner" (Brief, p. 21).

This complaint appears to be based in part upon petitioner's contention that the bargee was not present during the period when the damage took place (Brief, p. 10). On the contrary, no one knows when the damage took place (District Court opinion, R. 229, C. C. A. opinion, R. 304). The voyage started at Morris Heights, Harlem River, New York, on the morning of October 19, 1925. The tow laid up for the

night at Fisher's Dock, Bayonne, N. J., started out again in the morning of the 20th and arrived at her destination about an hour or an hour and a half later. The bargee was present during all of the towage on the first day, October 19; he left the boat unattended during the night of the 19th, and for the short period of the completion of the voyage on the morning of the 20th the boat was attended by a deckhand from the tug.

Nor is there any difference in the rule merely because a bargee does not happen to be provided. As this Court said in *The L. P. Dayton, supra:*

"Neither is it material that the facts of the case and the causes of the collision are peculiarly within the knowledge of the respondents. It is alleged in the present case, as one of the inconveniences of the libellant's situation, that it would be compelled, in order to establish the allegations of the libel, to resort to the testimony of those navigating the respective tugs, and thus call witnesses interested to exonerate the vessel to which they were attached. We are not aware, however, of any ground on which such an inconvenience can affect the rule of law which governs the rights of the parties" (p. 352).

Nor should it be overlooked that a towage contract does not contemplate the tug becoming the nurse of the tow. The latter still remains under the control of her owner's servants. It is solely for the purpose of performing the towage manœuvre that the vessels towed are under the management of the tug. In other respects, having to do with the internal management of the tow, which includes the handling of lines, upkeep and observation of damage, if and when sustained, responsibility remains on the tow. As this Court said in *The J. P. Donaldson,* 167 U. S. 599:

"It is solely for the purpose of performing the contract of towage, that the vessels towed are put under the control and management of the master of the tug. In all other respects, and for all other purposes, they remain under the control of

their respective masters; and, in case of unforeseen emergency, it is upon the master of each that the duty rests of determining what shall be done for the safety of his vessel and of her cargo" (p. 604).

Petitioner complains because when its bargee chose to go home, the tug master did not place a watchman aboard the tow (Brief, pp. 30, 34). But there was no obligation on the part of the tug to engage a watchman simply because petitioner's bargee failed to carry out instructions and remain on the tow until she arrived at her destination (R. 43). Furthermore, the petitioner's bargee acquiesced in the tow's mooring place and the protection given her. When he chose to leave the yacht over night, she remained there at the risk of her owner. In *The W. H. Baldwin*, 271 Fed. 411 (C. C. A 2d C.), the Court said:

"The bargemaster was the agent of the owner as far as the care of the barge was concerned. He acquiesced in leaving the barge in the position the tug left her. He threw the lines to the dock and sounded around the barge in attempting to determine the character of the bottom which she would rest upon. He apparently was satisfied with the position in which she was placed. These circumstances indicate that the master, and therefore the owner, took the risk of allowing the barge to remain in the position she was in when the tug had fulfilled its service" (p. 415).

II. EVEN HAD THE TUG BEEN A BAILEE AND A PRESUMPTION OF NEGLIGENCE HAD ARISEN FROM THE FACT OF DAMAGE, THE PRESUMPTION WOULD HAVE BEEN REBUTTED BY THE TESTIMONY.

We have shown above under Point I that the tug was not a bailee and that no presumption of negligence arose from the mere fact of damage. However, assuming there was a bailment and that a presumption of negligence arose, a bailee is not required to "explain" *how* the damage occurred, but only that the bailee was not guilty of neglect in the course of the bailment. The rule was recently stated by the Circuit Court of Appeals (Second Circuit), in *Cummings* vs. *Pennsylvania R. Co.*, 45 F. (2d) 152. In reversing the District Court, which had required the charterer of a barge to show "how the injury occurred", the Court remarked that this would put an added burden on a bailee, amounting to a duty to prove itself "omniscient respecting the injury." The Court said:

"Of course, this went too far in placing upon the defendant the burden of showing 'how the injury occurred,' for the presumption of negligence may be rebutted without necessarily doing that. To require it, would place the liability of the defendant, not on negligence alone as it is, *Clark* v. *United States*, 95 U. S. 539, 24 L. Ed. 518; *Tomkins Cove Stone Co.* v. *Bleakley Transportation Co., Inc. et al.* (C. C. A.) 40 F. (2d) 249, 250; *Bushey* v. *Hedger* (C. C. A.) 40 F. (2d) 417, 418, but on some added duty to prove itself omniscient respecting the injury as well as to rebut the presumption of negligence" (p. 153).

Inasmuch as no one knows when or how this damage was sustained, let us assume for the moment that it occurred while the vessel was lying at Fisher's Dock during the night, as contended by petitioner (Brief, p. 34). Then it must have been as a result of collision with some other moving

vessel or object. Certainly the tug cannot be charged with fault for such damage.

The Granite State, 3 Wall. 310.

Other assumptions could be indulged in as to how this damage occurred, but they must necessarily be mere speculation. The actual voyage is testified to by Simpson, deckhand on the tug (R. 56-78). His testimony is adequate to show what the tug did en route and that the tug was not negligent. For the convenience of the Court we set forth a brief résumé of his testimony and references to the parts of the record where it will be found, viz:

He testified that the yacht was taken in tow at Morris Heights on a hawser with the cradle astern of the yacht on a hawser (R. 60-2); that "nothing" happened until below Hell Gate, when the cradle's hawser broke and the *White City* had to go back and pick it up (R. 62-3); that the tow then proceeded down the Bay and through Kill van Kull until the steamer *Suscalanco* was passed, and the *White City* then put into Fisher's Dock at Bayonne (R. 63-4); that after telephoning for instructions, the tug master tied up the yacht for the night in "smooth water" alongside the dock with "big round rubber tires, fenders, to fend her off from the dock so that she wouldn't bang or scratch or hurt herself" (R. 63-4); that this was done "because it was getting darker just then and we thought it would be much better if we got an early start in the morning and took her out in daylight" (R. 65); that he stayed that night on the *White City* "ten or fifteen feet" from the *Drifter;* that before starting off the next morning at six or six thirty he looked over the boats and "couldn't see anything wrong". They were arranged "in tandem to go to Port Newark" which was 5 or 6 miles away. In the absence of the bargee, he

went on board the yacht and steered her to destination arriving about 7.30 or 8 A. M., and upon arrival the yacht was in the same condition as leaving Morris Heights "as far as I could see". He was later advised that when the yacht was lifted out of the water to place on the steamer, "a hole in the boat" was noticed and she was put back in the water again (R. 64-7).

That respondent was unable to supplement or corroborate Simpson's testimony was due to the death of respondent's other two witnesses, including the tug captain, and the successful efforts of petitioner's counsel in excluding the testimony of the two deceased witnesses, taken in the Municipal Court trial on the same cause of action, where the same counsel appeared and examined and cross-examined both witnesses (R. 70, 78).*

Furthermore, we cannot refrain from commenting upon petitioner's failure to produce the bargee, Weston, or to explain his non-production other than to state during the trial, "He has left the employ of the Consolidated and we can't find him" and "He is not under our control" (R. 77). Under the circumstances, it comes with ill grace from petitioner to complain because the record does not show *how* the accident occurred.

The failure to call a witness who could testify regarding the facts raises a presumption that the testimony of that witness would have been unfavorable to the case of the party failing to produce him.

In *Culbertson* v. *Shaw,* 18 How. 584, this Court said:

"The captain of the steamer was not sworn, and from this a strong presumption arises that his evidence would have been against his owners" (p. 588).

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* Exhibit H for Identification.

In *The Eastchester,* 20 F. (2d) 357 (C. C. A., 2d C.), the Court said:

"It is a rule based fairly on common sense that a failure to call a witness in such circumstances raises a presumption that he would have given unfavorable testimony if called. *The Bolton Castle,* 250 F. 403 (C. C. A. 1); *The New York,* 175 U. S. 187, 204; 20 Sup. Ct. 67, 44 L. Ed. 126" (p. 358).

See also

The New York, 175 U. S. 187, 204;
The Richmond, 275 Fed. 970; affirmed, 294 Fed. 90;
The Gulf of Mexico, 281 Fed. 77;
The Bolton Castle, 250 Fed. 403, 406;
The Fred M. Laurence, 15 Fed. 635, 636-7.

III. THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED.

Respectfully submitted,

CHAUNCEY I. CLARK,
FLORENCE J. SULLIVAN,
FREDERIC CONGER,
Counsel for Respondent.

Dated: New York, December 31, 1931.

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 217.

WILLIAM STEVENS,

Appellant,

against

The Vessel "WHITE CITY," her engines, tackle, apparel, etc.,

Appellee.

NOTICE OF MOTION AND AFFIDAVIT.

WILLIAM M. PURDY,
Counsel for Appellant.

CORPORATE PRESS, INC., New York City

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 217.

WILLIAM STEVENS,
Appellant,

against

The Vessel "WHITE CITY," her engines, tackle, apparel, etc.,
Appellee.

TO FLORENCE J. SULLIVAN, Esq., *Counsel for Appellee:*

PLEASE TAKE NOTICE that upon the annexed affidavit of James E. Freehill, verified the 12th day of November, 1931, the transcript of the proceedings in the court below heretofore filed herein, the appellant in the above-entitled cause will move this court in the court room at the City of Washington, in the District of Columbia, for an order diminishing the record filed in the above-entitled cause by the exclusion of the following matter:

Testimony taken before the special commissioner on the assessment of damages printed at pages 133-296.

Exhibits received in evidence upon said hearings printed at pages 301-304.

Report of special commissioner, exceptions to said report and order confirming report printed at pages 312-326.

Exhibits received upon said hearings before the special commissioner, printed at pages 407-408; upon the ground that it is irrelevant and unnecessary to this appeal and that the printing of said matter will serve only to enhance the expense to the appellant.

PLEASE TAKE FURTHER NOTICE that the appellant will move for an order granting an extension of time until January of 1932 for the argument of this appeal for the reason that further time is needed for obtaining a decision on the motion to diminish the record and for the printing of the additional copies of the record on appeal, and for such other and further relief as to the court may seem fit and proper.

Such motion will be submitted in the United States Supreme Court at the time provided for it by the Rules of that court.

A printed copy of said motion and of the affidavit in support thereof is annexed hereto and herewith served upon you.

Dated, November 12, 1931.

WILLIAM M. PURDY,
Counsel for Appellant.

IN THE
SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1931.
No. 217.

WILLIAM STEVENS,
Appellant,
against
The Vessel "WHITE CITY," her engines, tackle, apparel, etc.,
Appellee.

State of New York, } ss.:
County of New York, }

JAMES E. FREEHILL, being duly sworn, deposes and says:

I am one of the counsel for the appellant and have been personally in charge of this matter since its inception, having tried the case in the United States District Court for the Southern District of New York, and have personally argued the appeal before the United States Circuit Court of Appeals for the Second Circuit, and am familiar with all the facts and proceedings.

This is a motion by the appellant for an order to diminish the record already on file in this court by excluding the testimony taken before the special commissioner in the court below on the assessment of damages and the exhibits received on said hearings, upon the ground that it is wholly irrelevant and unnecessary, and further upon the ground that the printing of said testimony and exhibits will greatly enhance the expense to the appellant. This wholly extraneous matter will tend to becloud the real questions involved, which concern only the liability of the appellee.

This is an action *in rem* commenced in the United States District Court for the Southern District of New York, by the filing of a libel and complaint against the vessel "White City" to recover damages sustained to a motor boat "Drfter," damaged during towage. An interlocutory decree was rendered by District Judge Woolsey in admiralty, and subsequently, the assessment of damages was referred to a special commissioner. The testimony taken before the special commissioner and the exhibits received in evidence consumes many pages in the record on appeal.

After the report of the special commissioner was filed and confirmed, a final decree was entered in favor of the appellant. An appeal was thereafter taken to the United States Circuit Court of Appeals for the Second Circuit by the appellee, which court reversed the decree and dismissed the libel.

The petition for writ of certiorari was granted by this court on or about October 22, 1931, and upon information and belief, it was ordered "that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ."

No point was made by the appellee in the United States Circuit Court of Appeals, either in the oral argument or on the brief that there was any error committed by the special commissioner in the assessment of damages, and it is clear from the opinion of the Circuit Court of Appeals that the reversal of the decree and the dismissal of the libel was based solely on the question of liability.

The opinion of the Circuit Court of Appeals states (p. 414):

> "We see no reason to question the conclusion that the hole was made during the trip, and we dispose of the case upon that assumption."

The court further stated at page 415:

"* * * if free to choose, we should follow the decision below."

Prior to the making of this motion, I requested counsel for the appellee to stipulate to omit the printing of the testimony taken before the special commissioner on the assessment of damages as well as the exhibits received upon said hearings, but this request was refused although I stated that if there was any particular part of said matter which he felt was vital to the appeal, there would be no objection to the printing of said portion.

The appellant on this appeal, will not touch upon any matter involved in the hearings before the special commissioner upon the assessment of damages and will rely solely on those points set forth in the petition and brief for writ of certiorari.

POINT I—A tug performing a simple towage contract is a bailee for hire, particularly where the tow is manned only by a servant or bargee who is not present during the period when the damage to the tow takes place.

POINT II—Where a bailee for hire receives chattels in good condition and delivers the same in a damaged state, a *prima facie* case of negligence is made, which casts upon the bailee the burden of showing the circumstances surrounding the damage.

POINT III—Even assuming the correctness of the decisions of the Circuit Court of Appeals on the foregoing questions of law, the reversal was erroneous because there was ample proof of negligence on the part of the owners of the "White City" as well as facts from which the court could reasonably infer that the damage was caused by a negligent act.

If this motion is granted, there will be eliminated from the record, 182 pages and the record will be reduced from 442 pages to approximately 260 pages. If any useful purpose could be subserved by the inclusion of the proceedings before the special commissioner on the assessment of damages, there would be no objection to printing all of said matter.

The motion is made by appellant in entirely good faith in order that this court will not be burdened with a large record including much irrelevant matter, and to reduce the printing expenses to the appellant.

Although the appeal involves principles of law of great commercial importance on which there is much confusion in federal courts and among maritime lawyers, with respect to the rule of law to be adopted, the amount involved is extremely small.

Since the petition for writ of certiorari was granted by this court, the appellant has proceeded with due diligence, and it was only on November 2, 1931, that your deponent was informed by counsel for the appellee that the request to diminish the record would not be granted.

It is therefore, respectfully requested that the foregoing motion be granted and that the court order exclusion of the following matter from the record now on file:

Testimony taken before the special commissioner on the assessment of damages printed at pages 133-296.

Exhibits received in evidence upon said hearings printed at pages 301-304.

Report of special commissioner, exceptions to said report and order confirming report printed at pages 312-326.

Exhibits received upon said hearings before the special commissioner, printed at pages 407-408.

Since it will take a few weeks to obtain a decision on the motion to diminish the record and some further time will be necessary for the printing of the additional copies

of the record on appeal, it is respectfully requested that the court grant an extension of time to January, 1932, for the argument of said appeal.

Counsel for the respective parties have stipulated for an adjournment to January, 1932, and a copy of said stipulation is annexed hereto.

JAMES E. FREEHILL.

Sworn to before me this
12th day of November, 1931.

CORNELIA C. MULVIHILL,
Notary Public,
New York County.
N. Y. Co Clks. No. 329, Reg. No. 3M378.
Kings Co. Clks. No. 59, Reg. No. 3294.
Bronx Co. Clks. No. 22, Reg. No. 102M33.
Commission expires March 30, 1933.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1931.

No. 217.

WILLIAM STEVENS, *Appellant,* against The Vessel "WHITE CITY," her engines, tackle, apparel, etc., *Appellee.*	Stipulation to Continue.

IT IS HEREBY STIPULATED by and between counsel of record in the above-entitled cause, that this case may be continued until January session, 1932, of court, under the provisions of paragraph 1 of Rule 20.

Dated, New York, N. Y., November 4th, 1931.

NEIL P. CULLOM,
Attorney for Appellant.

FLORENCE J. SULLIVAN,
Attorney for Appellee.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 217

WILLIAM STEVENS,

Appellant,

against

THE VESSEL WHITE CITY, HER ENGINES, ETC.,

Appellee.

AFFIDAVIT IN OPPOSITION TO MOTION FOR AN ORDER DIMINISHING THE RECORD

CHAUNCEY I. CLARK,
FLORENCE J. SULLIVAN,
Counsel for Appellee.

[illegible] Printing Co., Inc., 154 Nassau St., New York, N. Y.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 217

WILLIAM STEVENS,
Appellant;
AGAINST
The vessel WHITE CITY, her engines, etc.,
Appellee.

STATE OF NEW YORK,
County of New York. } ss.

FLORENCE J. SULLIVAN, being duly sworn, deposes and says:

I am counsel for the appellee in the above-entitled cause and I am familiar with all the facts and proceedings heretofore had herein.

Appellant's motion for an order diminishing the record by excluding the testimony taken and exhibits received before the Special Commissioner should be denied for the following reasons:

1. The testimony and exhibits sought to be excluded are a part of the record before the Circuit Court of Appeals and were considered by that Court in rendering its opinion (R. 414).

2. The evidence now sought to be excluded from the record has a bearing upon the decision in this cause, especially under

the contention made by appellant under Point III, (appellant's brief, p. 27). The point reads:

"Even assuming the correctness of the decision of the Circuit Court of Appeals on the foregoing questions of law, the reversal was erroneous because there was ample proof of negligence on the part of the owners of the *White City* as well as facts from which the court could reasonably infer that the damage was caused by a negligent act."

In the affidavit of Mr. James E. Freehill, counsel for appellant, in support of the motion, it is stated that the matter sought to be excluded is "wholly extraneous matter" and "will tend to becloud the real questions involved," (Freehill affidavit, p. 3). The fact is that the "matter" is not extraneous and will not becloud the real questions involved, but, on the contrary, will assist the Court in arriving at a decision on the points presented. Under appellant's Point III it is argued that there was "ample proof of negligence on the part of the owners of the *White City,* as well as facts from which the Court could reasonably infer that the damage was caused by a negligent act". Deponent does not deem it necessary to quote at length from the testimony sought to be excluded—a few excerpts will be sufficient to satisfy this Court that the testimony should not be excluded, *e. g.,* at R. 149, upon cross-examination of Jolly, appellant's surveyor, his testimony sought to be excluded has an important bearing upon whether the damage was due to "negligence on part of the owners of the *White City.*"

"Q. Have you any idea what could have caused that (damage)?

* * *

A. I would say it was caused by either a drift log or bumping up against the dock or something—looked to me like it was done by a log or piling of some sort."

See also the testimony of the same witness upon the nature of the damage, which in turn may have an important bearing upon the question of negligence of the *White City*, as follows:

"Q. Then it must have sunk in a little bit, this depression; otherwise it wouldn't be a depression? A. Sure, it was in" (R. 147).

Again at page 150:

"Q. Was the depression below or above the water line? A. Right in the water line, somewheres around there. I can't just give the exact location."

See also the testimony of Edward Robicheau:

"Well, give us your best recollection. A. Hole on the starboard side about the water line and some planks broke, that's all I remember" (R. 234).

It is, therefore, respectfully requested that the foregoing motion be denied.

FLORENCE J. SULLIVAN

Sworn to before me this 2nd day of December, 1931.

FREDERICK W. MUELLER
Notary Public Queens Co. No. 2210, Reg. No. 1063
Cert. filed in N. Y. Co. No. 802, Reg. No. 2-M-555
Commission expires March 30, 1932

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JAN 5
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 217

WILLIAM STEVENS,

Petitioner,

vs.

THE VESSEL WHITE CITY, HER ENGINES, ETC.,

Respondent.

UNNECESSARY PARTS OF RECORD

CHAUNCEY I. CLARK,

Counsel for Respondent.

The Evening Post Job Printing Office, Inc., 184 Fulton St., New York, N. Y.

SUPREME COURT OF THE UNITED STATES

WILLIAM STEVENS,
Petitioner,

vs.

The vessel WHITE CITY, her engines, etc.,
Respondent.

No. 217
October Term
1931

Referring to Point IV of petitioner's brief with reference to the parts of the record unnecessarily printed, I agree that the testimony taken before the Special Commissioner on the assessment of damages printed at pages 97-224 need not be read by the Court, nor the exhibits received in evidence upon the hearings before the Commissioner printed at pages 226-8, nor the report of the Special Commissioner, exceptions to the Commissioner's report and order confirming report printed at pages 233-242.

Furthermore, the testimony before the Municipal Court, which appears in the record at pages 252-296, should not have been printed. It was excluded upon the trial, is not an exhibit, and should form no part of the record. It is marked Exhibit H for identification.

Respectfully submitted,

CHAUNCEY I. CLARK,
Counsel for Respondent.

Dated, New York, January 4, 1932.

SUPREME COURT OF THE UNITED STATES.

No. 217.—October Term, 1931.

William Stevens, Petitioner,
vs.
The Vessel "White City," Her Engines, Tackle, Apparel, etc., Claimant.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 14, 1932.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner, the assignee of the owner of a forty-five foot motorboat, the Drifter, filed a libel in admiralty in the southern district of New York against respondent to recover for injury sustained by the former while being towed by the latter. The court held that the tug was a bailee of the tow and that, it having been shown by the evidence that the former received the latter in good condition and delivered it damaged without being able to account for the injury, there was a presumption of negligence on the part of the tug and that she must be held liable. 35 F. (2d) 1006. The Circuit Court of Appeals held the towage contract did not put the tow in bail to the tug and that the mere fact of injury created no presumption of negligence, and reversed the decree. 48 F. (2d) 557.

Petitioner maintains that the tug was bailee for hire and that, by proving the tug received the tow in good order and delivered it in a damaged condition, he made a prima facie case of negligence which cast upon such bailee the burden of showing the circumstances surrounding the damage. And he insists that, even if the presumption did not so arise, there was ample proof of negligence on the part of the owners of respondent.

The facts supported by the evidence, so far as they are material to these contentions, may be stated briefly as follows:

October 13, 1925, Roos, an employee of the Consolidated Shipbuilding Corporation which had just completed the Drifter, made

an agreement with Alexander Simpson for its towage from the builder's plant at Morris Heights in New York City to Port Newark alongside the steamer Suscalanco on which it was to be shipped. Later Simpson told Roos that the White City, an excursion boat owned by Herbert Simpson and one Rhodes, would do the towing. Roos told Simpson that the boat should be at the plant at six o'clock in the morning. Her owners brought her about eight and were the only persons aboard at any time here involved. Employees of the builder assisted in attaching the Drifter, then in good condition, to the White City by a forty foot rope. A cradle in which the former was to be stowed on the deck of the Suscalanco was attached by another rope about the same length to the stern of the Drifter. The builder put an employee, one Weston, on the Drifter, merely, as petitioner maintains, to tend lines when she was brought alongside the Suscalanco.

Respondent took the tow down the East River; the cradle became detached at Hell Gate; reattaching it caused delay of fifteen or twenty minutes but no damage occurred to the Drifter at that time. Respondent continued down the river, across the Upper Bay, through Kill van Kull and into Newark Bay where, about five o'clock in the afternoon, she sighted the Suscalanco going out to sea. Then the tug went to Fisher's Dock in Bayonne and her owners having learned by telephone that the shipment could be made on a later steamer, remained there over night. The Drifter was tied alongside the pier with fenders to prevent injury. Weston, with the acquiescence of the owners of the tug, went home for the night but did not return. Simpson testified that on the morning following he went aboard the Drifter to steer her while she and the cradle were being towed to destination; that before leaving the dock he inspected her and that she was in the same condition as when received. When they arrived at Port Newark, about eight in the morning, the Drifter's hull planking was broken or damaged amidship on the starboard side just above the water line causing a dish-shaped depression about three-quarters of an inch deep, roughly circular and about twelve or fourteen inches in diameter. At the trial it was suggested by way of explanation that the hole might have been made by a piece of driftwood of which there was much in the bay. But there was no evidence to show, and the trial court found that neither Rhodes nor Simpson could explain, when, how or where the damage happened.

Decisions of this Court show that under a towage contract the tug is not a bailee of the vessel in tow or its cargo. And it is established here and by numerous rulings of lower federal courts that evidence showing a tug's receipt of a tow in good order and delivery in damaged condition raises no presumption of negligence.

The supplying of power by a vessel, usually one propelled by steam, to tow or draw another is towage. Many vessels, such as barges and canal boats, have no power of their own and are built with a view to receiving their propelling force from other sources. And vessels having motive power often employ auxiliary power to assist them in moving about harbors and docks. Benedict on Admiralty, 5th ed., § 100.

The tug does not have exclusive control over the tow but only so far as is necessary to enable the tug and those in charge of her to fulfill the engagement. They do not have control such as belongs to common carriers and other bailees. They have no authority over the master or hands of the towed vessel beyond such as is required to govern the movement of the flotilla. In all other respects and for all other purposes the vessel in tow, its cargo and crew, remain under the authority of its master; and, in emergency the duty is upon him to determine what shall be done for the safety of his vessel and her cargo. In all such cases the right of decision belongs to the master of the tow and not to the master of the tug. A contract merely for towage does not require or contemplate such a delivery as is ordinarily deemed essential to bailment. *The Steamer Webb*, 14 Wall. 406, 414. *Transportation Line* v. *Hope*, 95 U. S. 297, 299. *The L. P. Dayton*, 120 U. S. 337, 351. *The Propellor Burlington*, 137 U. S. 386, 391. *The J. P. Donaldson*, 167 U. S. 599, 603, 604. *Alexander* v. *Greene*, 3 Hill 1, 19. *Wells* v. *Steam Navigation Co.*, 2 Comstock 204, 208. Cf. *American Ry. Express Co.* v. *American Trust Co.*, 47 F. (2d) 16, 18. *Bertig* v. *Norman*, 101 Ark. 75, 81. *Sawyer* v. *Old Lowell National Bank*, 230 Mass. 342, 346. *Blondell* v. *Consol. Gas Co.*, 89 Md. 732, 746. *Gilson* v. *Pennsylvania R. R. Co.*, 86 N. J. L. 446, 449. *Fletcher* v. *Ingram*, 46 Wis. 191, 202. The owner of the Drifter did not surrender to respondent any right of control that does not pass in virtue of a contract merely for towage. The fact that the man put aboard by the builder did not remain to the end or that the owner did not choose to keep some one on the tow is immaterial.

Petitioner's claim against respondent is not for breach of contract but one in tort. His allegations and proof in respect of the agreement between the parties were made by way of inducement to his real grievance which was the damage to the Drifter claimed to have been caused by negligence of the respondent. It has long been settled that suit by the owner of a tow against her tug to recover for an injury to the tow caused by negligence on the part of the tug is a suit *ex delicto* and not *ex contractu*. *The Quickstep*, 9 Wall. 665, 670. *The Steamer Syracuse*, 12 Wall. 167, 171. *The J. P. Donaldson, supra*, 603. *The John G. Stevens*, 170 U. S. 113, 125. *The Brooklyn*, 2 Ben. 547. *The Deer*, 4 Ben. 352. *The Arturo*, 6 Fed. 308. In the case last cited Judge Lowell said (p. 312): "These cases of tow against tug are, in form and fact, very like collision cases. The contract gives rise to duties very closely resembling those which one vessel owes to others which it may meet." In *The John G. Stevens, supra*, this court cited *The Arturo*, approvingly and said (p. 126): "The essential likeness between the ordinary case of a collision between two ships, and the liability of a tug to her tow for damages caused to the latter by a collision with a third vessel, is exemplified by the familiar practice in admiralty . . . which allows the owner of a tow, injured by a collision caused by the conduct of her tug and of another vessel, to sue both in one libel, and to recover against either or both, according to the proof at the hearing". And the rule that the lien for damages occasioned by negligent towage takes precedence of liens for supplies previously furnished the offending vessel rests upon the ground that the claim, like those in case of collision, is one in tort arising out of duty imposed by law and independently of any contract or consideration for the towage. *The John G. Stevens, supra*, 126. *The Arturo, supra.*

While respondent was not an insurer or liable as a common carrier, it owed to the owner of the Drifter the duty to exercise such reasonable care and maritime skill as prudent navigators employ for the performance of similar service. The burden was upon petitioner to show that the loss for which he sought recovery was caused by a breach of that duty. The mere fact that the Drifter was in good order when received by respondent and in damaged condition when delivered does not raise any presumption of fault. As said by this court in *The L. P. Dayton, supra*, (p. 351): "To

hold otherwise would require that in every case, as between the tow and its tug, the latter should be required affirmatively to establish its defence against the presumption of its negligence. . . . (p. 352.) Neither is it material that the facts of the case and the causes of the collision are peculiarly within the knowledge of the respondents. It is alleged in the present case, as one of the inconveniences of the libellant's situation, that it would be compelled, in order to establish the allegations of the libel, to resort to the testimony of those navigating the respective tugs, and thus call witnesses interested to exonerate the vessel to which they were attached. We are not aware, however, of any ground on which such an inconvenience can affect the rule of law which governs the rights of the parties." See *The Steamer Webb, supra; Transportation Line* v. *Hope, supra.* The rule has been applied in numerous cases in the lower federal courts.[1] There is nothing about the injury itself to warrant any inference that it resulted from fault or negligence on the part of respondent.

There is no support for petitioner's contention that, without regard to the asserted presumption, the evidence shows that the injury to the Drifter was caused by negligence of respondent. The facts to which he refers are these: The tug arrived at the plant two hours late; respondent remained over night at Bayonne without authority and left the Drifter without a watchman; on the following morning, without effort to obtain the services of Weston or another, the tug proceeded to Port Newark. He calls attention to the absence of evidence further to show how the Drifter was moored at Bayonne and whether she was lighted during the night. On that basis he argues that it is possible that the injury occurred during the night; that the Drifter "might have been rammed by some other boat or if the lines were not slackened and

[1]Wilson *v.* Sibley (S. D. Ala.) 36 Fed. 379. The A. R. Robinson (Wash.) 57 Fed. 667. The W. H. Simpson (C. C. A.-7) 80 Fed. 153. Pedersen *v.* Spreckles (C. C. A.-9) 87 Fed. 938, 944-5. El Rio (S. D. Ala.) 162 Fed. 567. The Kunkle Bros. (N. D. Ohio) 211 Fed. 540, 543. The R. B. Little (C. C. A.-2) 215 Fed. 87. The Atlantic City (C. C. A.-4) 241 Fed. 62, 64. The Clarence L. Blakeslee (C. C. A.-2) 243 Fed. 365. Aldrich *v.* Pennsylvania R. Co. (C. C. A.-2) 255 Fed. 330. The Greenwich (C. C. A.-2) 270 Fed. 42. The W. H. Baldwin (C. C. A.-2) 271 Fed. 411, 413. The Ashwaubemie (C. C. A.-4) 3 F. (2d) 782. The Buttercup (E. D. La.) 8 F. (2d) 281. Southgate *v.* Eastern Transp. Co. (C. C. A.-4) 21 F. (2d) 47, 49.

the tide receded she might have been hanging on the side of the dock as the result whereof, a pile might have stove a hole in her side." The burden of proof as to respondent's negligence remained upon petitioner throughout the trial. His contentions clearly show that the evidence leaves the time, place and cause of the injury in the realm of conjecture. The evidence is consistent with an hypothesis that the tug was not negligent and with one that it was, and therefore has no tendency to establish either. *Gunning* v. *Cooley,* 281 U. S. 90, 94, and cases cited.

We find that respondent caused unnecessary parts of the record to be printed amounting in all to 186 pages. This is admitted in a statement filed by counsel for respondent. The cost of such printing will be charged to respondent. Rule 13, par. 9.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.